

2008

Kenneth L. Failor, Premium Plastics, Inc., Mary Gilmer v. Megadyne Medical Products, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

**KENNETH L. FAILOR; PREMIUM
PLASTICS, INC., a California
corporation and MARY GILMER,**

**Appellants/Plaintiffs/Counterclaim-
Defendants,**

v.

**MEGADYNE MEDICAL PRODUCTS,
INC., a Utah corporation, f.k.a. American
Medical Products, Inc.,**

Appellee/Defendant/Counterclaimant.

Appeal No: 20080459

**BRIEF OF APPELLEE
MEGADYNE MEDICAL PRODUCTS, INC.**

Appeal from an Interlocutory Order of the Third Judicial District Court, Salt Lake
County, Case No. 980907641, Honorable L.A. Dever, Order Dated May 6, 2008

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STATEMENT OF JURISDICTION

This appeal is taken by plaintiffs/appellants Kenneth L. Failor, Premium Plastics, Inc., and Mary Gilmer (“Appellants”) from the District Court’s May 6, 2008 Order Striking Appellants’ jury demand and denying Appellants’ Motion For Leave to File an Amended Consolidated Complaint. The Utah Court of Appeals has jurisdiction over this interlocutory appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF THE ISSUES

Issue No. 1: Whether the District Court correctly ruled that Appellants had waived their right to a jury trial for the period of time examined by a Special Master by requesting the equitable remedy of an accounting and by moving in 1998 for the appointment of the Special Master to determine whether defendant/appellee MegaDyne Medical Products, Inc. (“MegaDyne”) owed Appellants money under a series of royalty agreements.

Standard of Review: Whether the parties stipulated to be bound by the determinations of the Special Master is a factual question subject to a clearly erroneous standard. *State v. Pena*, 869 P.2d 932, 935 (Utah 1994). Whether Appellants are entitled to a jury on their claim for an equitable accounting is a question of law reviewed for correctness. *Id.* at 936.

Issue No. 2: Whether the District Court correctly overruled Appellants’ objections to the Special Master’s Final Report.

Standard of Review:

The Standard of review regarding a trial court's adoption of a master's findings following objections by a party is abuse of discretion. *Plumb v. State of Utah*, 809 P.2d 734, 743 (Utah 1990).

Issue No. 3: Whether the District Court correctly denied Appellants' Motion to File an Amended Consolidated Complaint, which was filed more than nine years after their original Complaint in this action.

Standard of Review: "The standard of review of a denial to amend pleadings is abuse of discretion." *Fishbaugh v. Utah Power & Light*, 969 P.2d 403, 405 (Utah 1998) (citation omitted).

DETERMINATIVE PROVISIONS

Utah Rule of Civil Procedure 15. Amended and Supplemental Pleadings:

(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Utah Rule of Civil Procedure 53. Masters.

See Ex. 1 of Addendum.

Portions of the Utah Uniform Trade Secrets Act, Utah Code Ann. §§ 13-24-1 through 13-24-4.

See Ex. 2 of Addendum.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

MegaDyne manufactures surgical equipment including, among other things, electrosurgical blades coated with a non-stick surface. This case arises from a dispute over payments due under a series of agreements between MegaDyne and plaintiffs/appellants Kenneth L. Failor, Premium Plastics, Inc. and Harvey Van Epps Gilmer, Jr.¹ MegaDyne's agreements with the Appellants required MegaDyne to pay them certain amounts for each blade coated or sold, depending on the agreement. Appellants filed their original Complaint on July 31, 1998, claiming that MegaDyne had failed to pay all amounts due under the agreements and requesting an accounting. (R. 1-43.) MegaDyne denied Appellants' allegations and filed a Counterclaim alleging that it had overpaid Appellants. (R. 44-50.)

At the outset of the case, Appellants (not MegaDyne) moved the Court "for appointment of a national accounting firm to serve as a master in this action and receive reference of the issues relating to the amounts of products coated and coated products sold under the parties' agreements. . . . Thereafter, the Court will be able to easily determine the amount of compensation owed by Defendant to Plaintiffs." (R. 72-73 (emphasis added).) Confident that it had paid Appellants all amounts due, MegaDyne did

¹ Mr. Gilmer passed away in 2006, and on July 21, 2006, his wife, Mary M. Gilmer, moved the Court to substitute her for Mr. Gilmer individually and in her capacity as trustee of the Harvey and Mary Gilmer Trust. (R. 4731.) The docket does not reflect that this unopposed motion has ever been granted. (*See* District Court Docket, Ex. 3 of Addendum.)

not oppose Appellants' Motion and executed a document prepared by Appellants entitled "Consent to Appointment of a Special Master." (R. 77-78.) The Court granted Appellants' Motion shortly thereafter, appointing John W. Curran of Ernst & Young, LLP as Special Master. (R. 84-89.)

After months of work, Mr. Curran reported his findings to the Court in a Final Report, which reflected the number of products coated and sold during the relevant period and concluding that MegaDyne had, in fact, overpaid Appellants. (R. 769-802.) Thus, on August 30, 2000, MegaDyne filed a Motion to Strike Jury Demand and for Judgment on the Special Master's Final Report. (R. 1135-1137.) In its Motion, MegaDyne requested that the Court strike Appellants' jury demand and enter judgment in favor of MegaDyne for the period of time covered by the Special Master's Final Report. This Motion was heard and taken under advisement on October 25, 2000, but not ruled upon at that time. (Addendum, Ex. 3 at 13-14.)

By agreement of the parties, on October 31, 2007, both Appellant and MegaDyne filed supplemental memoranda regarding, among other unresolved motions, (1) MegaDyne's Motion to Strike Jury Demand and to Enter Judgment on the Master's Report (filed 8/30/00); (2) Appellants' Motion for an Evidentiary Hearing on the Masters' Report; and (3) Plaintiffs' Objections to the Master's Report (filed 8/10/00). (R. 6324-6325; 6327-6328; 6330-6336; and 6338-6517.) Shortly thereafter, Appellants moved to amend their Complaint to drop their accounting claim and to add a claim for misappropriation of trade secrets. (R. 6527-6585.)

At a hearing on March 6, 2008, the District Court heard arguments on these and other pending motions and took the matters under advisement. On May 6, 2008, the District Court issued an Order denying Appellants' leave to file an amended Complaint. (R. 6704, ¶ 5.) The District Court also struck Appellants' jury demand and overruled Appellants' objections to the procedures utilized by the Special Master. (R. 6703, ¶ 2.) Although the order striking MegaDyne's jury demand appears on its face to apply to the entire case, MegaDyne only asked for the jury demand to be stricken with respect to the period of time covered by the Special Master's Report, and believes that the District Court's order striking the jury demand can only be affirmed with respect to that period of time.

Importantly, the District Court also ordered a hearing to determine whether the Special Master's findings were clearly erroneous "[b]ased on the allegations of error coupled with a report from the Plaintiff's expert." (R. 6703, ¶ 4.) This hearing never occurred due to Appellants' filing of a Petition for Permission to Appeal an Interlocutory Order on May 27, 2008 (R. 6706), which the Court of Appeals granted on June 26, 2008. (R. 6711.)

II. FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW.

A. The Agreements Between Appellants and MegaDyne.

1. Appellant Kenneth L. Failor ("Failor") signed an agreement with MegaDyne effective April 20, 1988. (R. 2, Appellants' Complaint, ¶ 7.) That agreement provided that MegaDyne would pay Failor \$0.05/unit of certain products "actually sold to customers" during the period of time relevant to this dispute. (R. 11-12, Ex. A to

Appellants' Complaint, ¶¶ 1-2.) This agreement had a nine-year term, which ended April 19, 1997. (*Id.*)

2. Appellant Premium Plastics, Inc. ("PPI") signed an agreement with MegaDyne effective June 1, 1988 (the "PPI Agreement"), in which it was engaged to coat certain MegaDyne products. (R. 22-31, Ex. B to Appellants' Complaint.)

3. The PPI Agreement was modified in an agreement dated March 26, 1991, to add Gilmer as a party. The modification provided that Harvey Van Epps Gilmer, Jr. would be compensated "\$0.06 per unit for all MegaDyne Products coated with Teflon by MegaDyne ." (R. 36, Ex. C to Appellants' Complaint, ¶ 6(G).) On September 15, 1997, the PPI/Gilmer contract was further modified to provide that MegaDyne would pay PPI "six cents (\$.06) for each electrode coated through September 30, 1997" but that "[b]eginning October 1, 1997 and continuing until December 1, 2005, MegaDyne shall pay to Premium each month six cents (\$.06) for each coated electrode invoiced or shipped to a third party for use or resale" (R. 42, Ex. E to Appellants' Complaint, ¶ 3.)

B. Appellants File Their Original Complaint and Request and Obtain a Court Order Appointing a Special Master.

4. Appellants filed their original Complaint against MegaDyne on July 31, 1998, asserting claims for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, accounting, and intentional or negligent misrepresentation and non-disclosure. (R. 1-43.)

5. Each of Appellants' causes of action are based on the allegation that MegaDyne has failed to pay them all amounts due under the various agreements. (*Id.*)

6. Appellants' Fourth Claim for Relief is entitled "Accounting," in which they allege that "[t]he exact amount of the breach . . . cannot be determined without an accounting of the coated medical products sold by MegaDyne." (R. 6, Appellants' Complaint, ¶ 35 (emphasis added).)

7. The first item in Appellants' Prayer for Relief was a request "[f]or an accounting of the receipts and/or sales of products coated with the non-stick coating by MegaDyne." (R. 7.)

8. Shortly thereafter, on December 11, 1998, Appellants filed a Motion for Appointment of Special Master. (R. 72-74.)

9. In their Motion, Appellants' moved "for appointment of a national accounting firm to serve as a master in this action and receive reference of the issues relating to the amounts of products coated and coated products sold under the parties' agreements. . . . Thereafter, the Court will be able to easily determine the amount of compensation owed by Defendant to Plaintiffs." (R. 72-73 (emphasis added).)

10. MegaDyne executed a Consent to Appointment of a Special Master, which Appellants filed that same day. (R. 77-78.) Appellants also obtained and filed the Affidavit of Impartiality of John W. Curran, a retired partner and a consultant to Ernst & Young, LLP. (R. 80-81.)

11. As a result, on February 12, 1999, pursuant to Rule 53 of the Utah Rules of Civil Procedure, Judge William A. Thorne signed an Order of Reference appointing John

W. Curran of Ernst & Young, LLP to serve as a Special Master, stating that “[t]he issues relating to the amount of the Defendant’s products coated and the Defendant’s coated products sold under the Agreements (attached as Exhibit A through E to Appellants’ Complaint) are hereby referred to the master.” (R. 86.) The Court ordered the Special Master to take evidence and to prepare a report of his findings for the Court. (*Id.*)

C. Appellants Begin a Campaign to Influence and Discredit the Special Master.

12. Appellants filed their first Motion to Vacate Order of Reference Appointing Special Master on November 3, 1999, based on claims that the Special Master had failed to file a status report within 60 days of his appointment, that he had failed to provide a date upon which his report would be completed, and he was not following a work plan. (R. 244-45.) The District Court rejected these procedural objections and Appellants’ Motion was denied. (*See* Vol. 2 of District Court Record, unnumbered May 23, 2000 Order, ¶ 1.)

13. Undaunted, Appellants filed a Renewed Motion to Vacate Order of Reference on May 26, 2000, based on the claim that the Special Master had failed to comply with a District Court order directing him to complete certain actions by April 23, 2000. (R. 352-53.) The Court rejected this objection, as well, and denied Appellants’ Renewed Motion on July 17, 2001. (R. 1970-71.)

14. The Special Master did not engage in an ex parte process. The only challenged communications between the Special Master and MegaDyne involved requests by the Special Master for production of records and information. (Appellants’

Brief at 12-14.) The Special Master had informed the parties that it would conduct its examination on May 3, 1999, at MegaDyne's headquarters. (R. 6508.) Appellants made no request to attend (R. 6508), but now wish to characterize the Special Master's work there as *ex parte*.²

15. Appellants have never submitted evidence of any *ex parte* contacts between MegaDyne's attorneys, officers or principles and the Special Master.

D. The Special Master Determines That for the Periods Examined, MegaDyne Overpaid Appellants.

16. Following a comprehensive investigation and analysis that is described in his report, the Special Master filed his Report of Special Master on June 16, 2000. (R. 430-645.)

17. In his report, the Special Master concluded the following for the period he reviewed:

- a. For the period relevant to Failor, March 1, 1996 to April 20, 1997, MegaDyne coated 4,747,425 units and sold 3,974,777. (R. 442.)
- b. Under the Failor Agreement (R. 11-20), MegaDyne was required to pay Failor \$0.05 "for each unit of [MegaDyne] products actually sold to customers of [MegaDyne] during the term hereof." The Special Master determined that based on payments MegaDyne made to Failor (which are not in dispute) and multiplying the number of units sold by \$0.05, **MegaDyne overpaid Failor \$66,525.60 during this period.** (R. 442.)

² Plaintiffs conducted discovery regarding these so-called *ex parte* contacts, including taking the sworn statement of JoAnn Hall, a MegaDyne employee assigned to assist with producing documents to the Special Master. Ms. Hall testified: "Q: Was the, was the conversations you had with the folks at Ernst & Young different than, 'JoAnn, can you find this document for us?' Was that the nature of it? A: That was what, that was what it was." (R. 6474, Sworn Statement of JoAnn Hall at 176:2-5.)

- c. The Special Master was aware that Failor urged a different interpretation of the contract that required MegaDyne to pay him \$0.05 per unit coated, rather than unit sold. The Special Master reported that under Failor's interpretation, MegaDyne overpaid him \$27,893.20 during this period. (R. 442.)
- d. With respect to Gilmer/PPI, there were two relevant time periods. The time period March 1, 1996 to September 30, 1997, during which MegaDyne was required to pay Gilmer/PPI \$0.06 per unit coated, and October 1, 1997 through March 31, 1999, during which MegaDyne was required to pay Gilmer/PPI \$0.06 per unit sold. (R. 443-446.)
- e. The Special Master reported that from March 1, 1996 to September 30, 1997, MegaDyne coated 5,473,078 units. The Special Master reported that based on payments MegaDyne made to Gilmer/PPI during this first period, and multiplying the number of units coated by \$0.06, MegaDyne overpaid Gilmer/PPI \$28,140.54 during this period. (R. 445.)
- f. The Special Master reported that from October 1, 1997 to March 31, 1999, MegaDyne sold 4,832,323 units. The Special Master reported that based on payments MegaDyne made to Gilmer/PPI during this second period, and multiplying the number of units MegaDyne sold by \$0.06, MegaDyne underpaid Gilmer/PPI \$7,842.12 during this period. (R. 445.)
- g. Taking into account the \$28,140.54 overpayment and the \$7,842.12 underpayment, the Special Master reported that **MegaDyne's total overpayment to Gilmer/Premium Plastics was \$20,298.42.** (R. 445.)

E. Appellants Continue Their Attack On The Special Master's Work And Report.

18. On July 6, 2000, Appellants filed Objections and Recommendations to the Master Concerning His Report. (R. 707-726.)

19. On August 3, 2000, the Special Master filed the Final Report of Special Master. (R. 769-802.) Although the Special Master made minor corrections to his previous report based on objections by both Appellants and MegaDyne, the figures

reported above in paragraph 18(a)-(g) did not change. A copy of the Final Report of Special Master is attached to the Addendum hereto as **Exhibit 4**. (R. 769-802.)

20. Together with the Final Report of Special Master, the Special Master filed an additional document entitled Special Master Response to Plaintiffs and Defendant Objections and Recommendations to the Report of Special Master, which is attached to the Addendum hereto as **Exhibit 5**. (R. 803-833.) In the Special Master Response, the Special Master responds to Appellants' various objections line by line. (*Id.*)

21. On August 18, 2000, Appellants filed their Objections to Final Report of Special Master. (R. 840-1108.)

22. On August 30, 2000, MegaDyne filed its Motion to Strike Jury Demand and for Judgment on the Special Master's Final Report. (R. 1135-36.)

23. On October 10, 2000, Appellants filed their first Motion to Reject the Master's Report. (R. 1269-1270.)

24. As an exhibit to Appellants' first Motion to Reject the Master's Report, Appellants' provided an Expert Report prepared by Scott D. Hampton of Campos & Stratus dated September 29, 2000. Although the "Expert Report" offered various criticisms of the Special Master's work, it did not offer its own opinion of the number of units coated or sold during any period. In the "Reply to Expert Report Prepared by Campos & Stratis" filed on October 23, 2000, attached to the Addendum hereto as **Exhibit 6**, the Special Master responded to and refuted Plaintiff's Expert Report. (R. 1349-55.)

25. On October 17, 2001, Appellants filed a **Renewed Motion** to Vacate the Order of Reference (R. 2094-95), a Renewed Motion to Reject Special Master's Report. (R. 2122-23), and a Motion for Evidentiary Hearing regarding the Special Master's Report. (R. 2097-2098.)

26. Following a hearing, the District Court **denied** Appellants' Renewed Motion to Vacate the Order of Reference and Renewed Motion to Reject the Special Master's Report. (R. 2434.)

27. However, the District Court deferred ruling on Appellants' Motion for an Evidentiary Hearing "until Derk Rasmussen completes his review and analysis of the documents the Court has ordered produced." (R. 2434.)

28. All such documents were produced, and on January 30, 2004, MegaDyne was forced to move the Court to order Appellants to return its original documents. (*See* R. 3587-92 and February 26, 2004 Minute Order requiring return of MegaDyne documents within 24 hours, Ex. 3 hereto at 26.)

F. Recent Motion Practice Leading to This Appeal.

29. By agreement of the parties, on October 31, 2007, both Appellant and MegaDyne filed supplemental memoranda regarding, among other unresolved motions, (1) MegaDyne's Motion to Strike Jury Demand and to Enter Judgment on the Master's Report (filed 8/30/00); (2) Plaintiffs' Motion for an Evidentiary Hearing on the Masters' Report; and (3) Plaintiffs' Objections to the Master's Report (filed 8/10/00). (R. 6324-6325; 6327-6328; 6330-6336; and 6338-6517.)

30. Shortly thereafter, Appellants moved to amend their Complaint. (R. 6527-28.)

31. In their Proposed Amended Complaint, Appellants' attempt to allege for the first time that MegaDyne violated the Utah Uniform Trade Secrets Act because Gilmer revealed unspecified trade secrets under seal in patent litigation MegaDyne filed in 1993 against a third party called Aspen Laboratories, Inc. (R. 6543.) Gilmer and PPI do not allege that MegaDyne used the trade secrets for any purpose other than the litigation, but allege nonetheless that they should share in the recovery MegaDyne obtained in that and other litigation. (R. 6533, 6543.)

32. Appellants' proposed Amended Complaint also deletes Appellants' prior equitable claims for an accounting and for declaratory relief. (R. 6530-6589.)

33. At a hearing on March 6, 2008, the District Court heard arguments on these and other pending motions and took the matters under advisement. On May 6, 2008, the District Court issued an Order denying Appellants' leave to file an amended Complaint. (R. 6704.) The District Court also struck Appellants' jury demand and overruled Appellants' objections to the procedures utilized by the Special Master. (R. 6703.)

34. Importantly, the District Court also ordered a hearing to determine whether the Special Master's findings were clearly erroneous "[b]ased on the allegations of error coupled with a report from the Plaintiff's expert." (R. 6703.)

35. The evidentiary hearing regarding the Special Master's findings never occurred due to Appellants' filing of a Petition for Permission to Appeal an Interlocutory

Order on May 27, 2008 (R. 6706), which the Court of Appeals **granted** on June 26, 2008. (R. 6711.)

SUMMARY OF ARGUMENTS

The District Court correctly struck Appellants' jury demand **for** the period of time covered by the Special Master's Report. In their initial Complaint, Appellants requested an accounting, and thereafter moved the District Court "for appointment of a national accounting firm to serve as a master in this action and receive reference of the issues relating to the amounts of products coated and coated **products** sold under **the parties'** agreements. . . . Thereafter, the Court will be able to easily determine the amount of compensation owed by Defendant to Plaintiffs." (R. 72-73 (emphasis added).)

MegaDyne consented to the appointment, and the **Special Master** did his work and reported that MegaDyne had, in fact, overpaid Appellants during the relevant time period.

During the course of the Special Master proceedings and thereafter, Appellants lodged numerous objections with the District Court regarding the procedure he employed. The District Court correctly exercised its discretion in overruling these procedural objections, including objections to alleged *ex parte* procedures employed by the Special Master, the **timeliness** of his report, his non-use of Requests for Production under Federal Rule of Civil Procedure 34, etc.

Appellants also asserted objections to the substance of the Special Master's Report, which are repeated in Appellants' brief in a laundry list of bullet points at pages 15-19 (Statement of Fact Nos. 36 and 38.) These objections are based on statements

from Appellants' expert, without citation to any of the underlying documents on which his testimony is purportedly based, and on unsworn statements of counsel.

On March 6, 2008, in response to a Motion by MegaDyne, the District Court struck Appellants' jury demand. Although the order striking MegaDyne's jury demand appears on its face to apply to the entire case, MegaDyne only asked for the jury demand to be stricken with respect to the period of time covered by the Special Master's Report, and believes that the District Court's order striking the jury demand can only be affirmed with respect to that period of time.

The District Court also overruled Appellants' procedural objections to the Special Master's Report, which it had dealt with numerous times previously. However, in response to Appellants' objections and Motion for Evidentiary Hearing, the District Court ordered a hearing on Appellants' substantive objections to determine whether the Special Master's Report was "clearly erroneous" under Utah Rule of Civil Procedure 53.

Appellants' petitioned this Court for interlocutory review of the March 6, 2008 Order before the evidentiary hearing took place. As a result, there is an inadequate record to determine whether the Special Master's Report is clearly erroneous, and the District Court has not yet adopted the Special Master's Report. The issue of whether the substance of the Special Master's Report is clearly erroneous is therefore not ripe for review, and the issue should be remanded to the District Court so that the evidentiary hearing requested by Appellants can take place.

Finally, after 9-1/2 years of litigation, Appellants moved the District Court to file an Amended Complaint, dropping their equitable claim for an accounting and adding a

claim under the Utah Uniform Trade Secrets Act, claiming that Appellants should have received proceeds from patent litigation prosecuted by MegaDyne because Gilmer allegedly disclosed trade secret information during depositions in such litigation. The District Court did not abuse its discretion by determining that the proposed amendment was untimely, and the order should also be confirmed because the proposed amendment was futile and prejudicial to MegaDyne.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY STRUCK APPELLANTS' JURY DEMAND FOR THE PERIOD COVERED BY THE SPECIAL MASTER'S REPORT.

The District Court correctly struck Appellants' jury demand with respect to the period of time covered by the Special Master because Appellants alleged a claim for an accounting and stipulated to the "appointment of a national accounting firm to serve as a master in this action and receive reference of the issues relating to the amounts of products coated and coated products sold under the parties' agreements. . . . Thereafter, the Court will be able to easily determine the amount of compensation owed by Defendant to Plaintiffs." (R. 72-73 (emphasis added).) Appellants and MegaDyne stipulated to this procedure. (R. 72-73; 77-78.)

"An action for an accounting is usually a two-step process in which there must be a proceeding to determine the plaintiff's right to an accounting . . . before the accounting is ordered." 1A Corpus Juris Secundum, Accounting § 45. "After a judgment to account, a court may itself take the account The usual practice, however, is to refer the matter to a special master, referee or similar officer." *Id.*, § 47. "If no exception, or valid

exception, is taken, the findings of a referee or master regarding an account will stand.”

Id., § 51. “A final judgment in a suit for an accounting must follow the order for an accounting, and the accounting pursuant to that interlocutory order. . . . After the account has been taken and an amount found due from one party to another, a judgment for payment follows as a matter of course” *Id.*, § 53.

In this case, Appellants asserted a claim for an accounting in their Complaint and, citing the complexity of this case, immediately moved the Court for an interlocutory order appointing a master to determine the number of MegaDyne products coated and sold and, therefore, whether MegaDyne owed the Appellants money or vice versa. Although cite numerous cases stating that the pleading of equitable claims and the appointment of a special master normally do not deprive parties of their jury trial right, those cases are distinguishable. In this case, Appellants elected to pursue their equitable remedy first. Now, more than seven years after the Special Master filed his Final Report and after the parties have each spent tens of thousands of dollars for him to do his work, Appellants want to wish away the Special Master’s report and start from scratch.

None of the cases Appellants cite address a situation where, like here, Appellants have sought and obtained a Court-ordered accounting and stipulated that based on the master’s findings, “the Court will be able to easily determine the amount of compensation owed by Defendant to Plaintiffs” (R. 72-73), before pursuing their legal claims. Thus, in this case it was entirely appropriate for the District Court to strike Appellants’ jury demand for claims covering the period examined by the Special Master.

Furthermore, there are cases, like this one, where the accounts are so complex that only a court of equity can unravel them through an accounting. Although an equitable claim for accounting is generally not available when there is an adequate remedy at law, “an accounting may yet be appropriate where ‘the accounts between the parties are of such a complicated nature that only a court of equity can satisfactorily unravel them.’” *Haynes Trane Service Agency, Inc. v. American Standard, Inc.*, 51 F.App’x 786, 800 (10th Cir. 2002) (citation omitted) (reversing dismissal of accounting claim because over 3,000 transactions were at issue). This case involves tens of thousands of transactions and millions of individual units coated and sold, and Appellants’ themselves urged the Court to appoint a master because of the complexity of the contracts and transactions at issue in this case. Thus, the accounting ordered by the Court and relied upon to strike Appellants’ jury demand is even more appropriate here than it was in *Haynes*.

II. APPELLANTS’ ISSUE NO. 2 IS NOT RIPE FOR REVIEW BECAUSE THE DISTRICT COURT HAS NOT RULED ON APPELLANTS’ SUBSTANTIVE OBJECTIONS TO THE MASTER’S REPORT.

A. Appellants’ Objections Regarding the Substance and Reliability of the Master’s Report Are Premature Because the District Court Has Not Ruled on Them.

Utah Rule of Civil Procedure 53 sets forth the procedure once a Special Master has submitted a report on a non-jury issue, like the accounting to which the parties stipulated in this case. Rule 53 provides that

In an action to be tried without a jury the court *shall accept* the master’s findings of fact *unless clearly erroneous*. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and

upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

Utah R. Civ. P. 53(e)(2)(emphasis added).

Here, the District Court has not determined that it will adopt the report, modify it or reject it based on Appellants' objections to the substance of the report. In the Order from which this appeal is taken, the District Court ordered a hearing to determine whether the Special Master's findings were clearly erroneous "[b]ased on [Appellants'] allegations of error coupled with a report from the Plaintiff's expert." (R. 6703.) Thus, although Appellants' Issue No. 2 is "[w]hether the district court erred in denying the Premium Plaintiffs' Objections of the Master's . . . Final Report" (Appellants' Brief at 2), the District Court has not overruled those objections, but instead ordered the evidentiary hearing requested by Appellants to consider those objections.

As a result, Appellants' arguments regarding the reliability of the Special Master's Report and potential errors or inaccuracies in the report are premature because those issues are not ripe for review, even on an interlocutory appeal. For example, in *State v. Herrera*, 895 P.2d 359 (Utah 1995), the Utah Supreme Court refused to consider the constitutionality of Utah's mental illness standard on an interlocutory appeal, where neither defendant had been convicted of a crime or sentenced, stating that:

[t]his court will not issue advisory opinions or examine a controversy that has not yet sharpened into an actual or imminent clash of legal rights and obligations between the parties thereto. Where there exists no more than a difference of opinion regarding the hypothetical application of a piece of legislation to a situation in which the parties might, at some future time, find themselves, the question is unripe for adjudication.

Id. at 371; *see also* *Pett v. Autoliv ASP, Inc.*, 2005 UT 2, ¶ 4 (refusing to consider issue on interlocutory appeal on ripeness grounds because “any direction we may provide . . . would be little more than an advisory opinion and may ultimately prove to be irrelevant, or even flawed, after a final judgment has been rendered in this case.”).

Here, any ruling on Appellants’ substantive objections and arguments regarding the reliability of the Special Master’s Report would be similarly advisory. The District Court has not overruled Appellants’ substantive objections, but instead ordered an evidentiary hearing regarding them. (R. 6703.) As discussed in detail below, there is not even a sufficient factual record for the Court of Appeals to consider Appellants’ arguments. Appellants’ objections and arguments regarding the findings of the Special Master and the substance of his report are simply not ripe for adjudication.

**B. The District Court Correctly Rejected Appellants’
Procedural Objections to the Special Master’s Report.**

As detailed in the Statement of Facts, above, the District Court repeatedly overruled numerous objections by Appellants’ to the Special Master’s procedures. In each case, the District Court correctly found that the alleged procedural errors had either not occurred or were inconsequential. As detailed below, the Court of Appeals should defer to the District Court’s findings and uphold the portion of its Order overruling Appellants’ procedural objections. *See Plumb v. State of Utah*, 809 P.2d 734, 744 (Utah 1990).

1. The Special Master Had a Work Plan.

Appellants' first argue that the Special Master failed to create a work plan. The District Court rejected this argument on at least three separate occasions after full briefing. (*See* Vol. 2 of District Court Record, unnumbered May 23, 2000 Order, ¶ 1; R. 2434.)

In fact, the argument that the Special Master did not have a work plan is absurd. The work the Special Master did, including the review and examination of voluminous documents, the taking of testimony of relevant witnesses, etc., is plainly detailed in the Final Report of Special Master. The parties met with the Special Master on April 21, 1999, and discussed his proposed plan and methodology. (R. 6508.) He subsequently met with them again on June 2, 1999. (*Id.*) Before submitting his Final Report, the Special Master reported to the Court on numerous occasions regarding his progress and his plan, usually in response to criticisms from Appellants. (*See, e.g.,* Correspondence Regarding Work to be Completed and Estimated Time of Completion filed on May 23, 2000, R. 332-42.) Furthermore, the Special Master met and corresponded with both Appellants and MegaDyne regarding his plan and progress. (R. 6508.)

2. The District Court Did Not Abuse Its Discretion by Rejecting Appellants' Claims that the Special Master Failed to Comply with Deadlines.

The District Court's decisions regarding its own scheduling orders are reviewed under an abuse of discretion standard. "Trial courts have broad discretion in managing the cases before them Therefore, we review whether a trial court properly ruled on pretrial compliance with a scheduling order under an abuse of discretion standard."

Normandeau, v. Hanson Equip., Inc., 2007 UT App 382, ¶ 9 (citation omitted).

Appellant does not establish or argue that it was prejudiced by any delay by the Special Master or that any error by the District Court regarding enforcement of its scheduling orders was in any way harmful. The Court of Appeals should reject this argument, as well.

3. The Master Was Not Required to Formally Request Documents Under Rule 34 of the Utah Rules of Civil Procedure.

Although the Order of Reference permitted the Special Master to utilize subpoenas and/or Rule 34 document requests, it did not require him to do so. MegaDyne voluntarily supplied its documents and the Special Master had no need to utilize those procedures. As detailed in MegaDyne's initial Response to Plaintiffs' Objections to the Final Report of the Special Master, MegaDyne agreed at an April 21, 1999 meeting that employees of Ernst and Young would go to MegaDyne's headquarters and would be provided all documents they requested, with the exception of tax returns and financial statements. (R. 6434.) Appellants voiced no objection to voluntary disclosure and that is how the Special Master's work proceeded. Appellants identify no authority suggesting that the Special Master's Report should be rejected on this basis.

4. The District Court Did Not Abuse Its Discretion by Overruling Appellants' Unfounded Objection that the Special Master Engaged in Improper Ex Parte Contacts with MegaDyne.

The only communication between the Special Master and employees of MegaDyne involved requests by the Special Master for production of records. The Special Master informed the parties that it would conduct its examination on May 3,

1999, at MegaDyne's headquarters. Appellants made no request to attend (R. 6508-6510), but now wish to characterize the Special Master's work there as *ex parte*. This argument has been and should be rejected.

As demonstrated by the evidence cited by Appellants, the only challenged communications were between the Special Master and employees of MegaDyne involving requests by the Special Master for production of records. (Appellants' Brief at 12-14.) Appellants have already conducted discovery regarding these so-called *ex parte* contacts, including taking the sworn statement of JoAnn Hall, a MegaDyne employee assigned to assist with producing documents to the Special Master. Ms. Hall testified: "Q: Was the, was the conversations you had with the folks at Ernst & Young different than, 'JoAnn, can you find this document for us?' Was that the nature of it? A: That was what, that was what it was." (R. 6474, Sworn Statement JoAnn Hall at 176:2-5.)

Despite conducting discovery on the issue, Appellants have not established any *ex parte* contacts between the Special Master and MegaDyne's counsel or its officers. The District Court did not abuse its discretion by rejecting this objection, based on the nature of the challenged communications and the fact that Appellants were invited to participate in the document review at MegaDyne, but did not. The District Court's order overruling this objection should be affirmed.

5. The Special Master Did Not Exceed the Scope of the Order of Reference.

The District Court also did not err by overruling Appellants' objection that the Special Master's Report exceeded the scope of the Order of Reference. The Order of

Reference provides that “[t]he issues relating to the amount of the Defendant’s products coated and the Defendant’s coated products sold under the Agreements . . . are hereby referred to the master.” (R. 84-89, ¶ 3.) That is exactly the work the Special Master performed. For example, he determined that between March 1, 1996 and April 20, 1997, the period relevant to Failor’s claims, MegaDyne coated 4,747,425 units and sold 3,974,777 units. (R. 781.) He also determined that between **March** 1, 1996 and March 31, 1999, the period relevant to Gilmer’s claims, MegaDyne coated 5,473,078 units and sold 4,832,401. (R. 784.)

Once the number of units coated and sold was determined, it was simple arithmetic to determine how much money Appellants were due and the difference between those amounts and the amounts MegaDyne actually paid. The fact that the Special Master performed these simple calculations does not invalidate his report under the Order of Reference or otherwise. The Court of Appeals should affirm the District Court’s overruling of this objection, as well.

C. Appellants’ Various Objections to and Criticisms of the Substance of the Special Master’s Report Do Not Establish that It Is “Clearly Erroneous.”

Appellants have not meaningfully challenged the Special Master’s work or conclusions. None of the expert reports they have commissioned, including the report of RGL Gallagher LLP, which was initially attached to Appellants’ unsuccessful October 17, 2001 Renewed Motion to Reject Final Report of Special Master, show an alternative number of blades coated or sold. Instead, they merely take potshots at the Special Master’s methodology. Mr. Curran’s expertise in this area, however, is precisely why the

parties determined to accept him as a Special Master in this case. Appellants' unfounded suspicions and criticisms of the Special Master's work do not amount to evidence that his conclusions are "clearly erroneous" under Utah Rule of Civil Procedure 53.

The Special Master himself addressed most of Appellants' criticisms in his Response to Plaintiffs and Defendant Objections and Recommendations to the Report of Special Master. He explained, for example that although Appellants asserted that MegaDyne averaged coating 341,783 per month, they did not explain in any manner how that number was calculated. (R. 821.) He debunked Appellants' accusations regarding "missing invoices" (R. 823-24), etc. He also explained the differences between the reports MegaDyne had provided to each Appellant. (R. 1353.) In short, Appellants provide no evidence that the Special Master's methodology, which he detailed in his report along with a comprehensive list of documents relied upon, was flawed in any way. The Special Master's report is the product of an unbiased, third-party master appointed by the District Court.

Appellants' other attempts to discredit the substance of the Special Master's work fall short, as well. The documents provided with Appellants' objections do not establish any flaws in the Special Master's work, let alone establish that it is "clearly erroneous." For example, Appellants' assertions that the Special Master undercounted 397,306 coated pieces and that MegaDyne owes a minimum of \$62,227.14 (Appellants' Brief at 15, bullet points 1 and 2) are based on unauthenticated records of invoices from entities that supplied metal to MegaDyne for coating. (R. 852, 1070-1084.) At best, they indicate the

number of uncoated blades purchased by MegaDyne for its inventory, not the number of blades coated in any period.

Appellants' assertion that MegaDyne's purchases inexplicably declined from an average of 375,000/month to 18,000 in November 1996 (Appellants' Brief at 15, bullet point 3) is unsupported by any evidence. Appellants provide no citation in the record to documents supporting either number, and do not explain how they calculated the 375,000/month average. And although Appellants' assert that there are wide variations in the products coated between the Failor and Gilmer/PPI schedules and that the schedules were constructed differently, they do not provide record sites to any such schedules or detail any particular variation. Appellants merely cite their own conclusory statement in the objection they filed. (Appellants' Brief at 15-16.)

In fact, the first 13 bullet points in Appellants' laundry list of "errors" in paragraph 38 of their Statement of Facts are all based on the unsworn opinion of Appellants' expert, Derk Rasmussen. (Appellants' Brief, pp. 16-17 (citing Plaintiffs' Supplemental Memorandum Re: Plaintiffs' Objections to the Master's Report, R. 6330-36 and Mr. Rasmussen's October 17, 2001 letter to Appellants' counsel, R. 2101-2118).) The documents Mr. Rasmussen purports to rely on are not provided or authenticated, his opinion contains multiple layers of hearsay, and importantly, it has not been subject to cross-examination.

The remainder of Appellant's alleged "errors" in the bullet point list are based on the unsworn argument of Appellants' counsel in Plaintiffs' Supplemental Memorandum Re: Plaintiffs' Objections to the Master's Report. (Appellants' Brief, pp. 17-18 (citing

Plaintiffs' Supplemental Memorandum Re: Plaintiffs' Objections to the Master's Report, R. 6330-36.) The documents upon which these objections are based are not provided or authenticated, the statements contain multiple layers of hearsay, and the statements have not been subject to cross-examination. As a result, they do not provide a basis for determination that the District Court has abused its discretion with respect to the Special Master's work, particularly in light of the fact that the District Court ordered a hearing regarding the substance of the Special Master's Report, which has not yet taken place. Appellant respectfully requests that the Court of Appeals affirm the District Court's decision.

III. THE TRIAL COURT CORRECTLY REJECTED APPELLANTS' PROPOSED AMENDED COMPLAINT BECAUSE THE AMENDMENT WAS FUTILE, UNTIMELY AND PREJUDICIAL TO MEGADYNE.

As discussed below, the denial of Appellants' motion for leave to file the proposed Amended Consolidated Complaint was well-within the District Court's discretion for three, equally compelling reasons. First, Appellants' new cause of action for misappropriation of trade secrets fails to state a claim for relief as a matter of law, rendering the proposed Amendment futile. Second, Appellants' attempt to abandon their prior equitable claim for an accounting would be prejudicial to MegaDyne. Third, Appellants' proposed Amendment, filed more than nine years after the commencement of this litigation, is untimely.

A. Appellants' Proposed Amendment Is Futile Because It Fails to State Facts Sufficient to Allege a Cause of Action Under the Utah Uniform Trade Secret Act.

It is entirely appropriate to deny leave to amend a pleading if the proposed amendment is futile, *i.e.*, if the proposed amendment would not survive a motion to dismiss. “Although leave to amend is ‘freely given when justice so requires,’ Utah R. Civ. P. 15(a), justice does not require that leave be given if doing so would be futile. . . . It is well settled that a court may deny a motion to amend as futile if the proposed amendment would not withstand a motion to dismiss.” *Jensen v. IHC Hosps., Inc.*, 2003 UT 51, ¶ 139 (internal quotations and citations omitted) (affirming denial of motion to amend a fraud cause of action because it was legally insufficient). Additionally, “[i]n reviewing a trial court’s ruling on a motion to amend, three factors are relevant: (1) the timeliness of the motion; (2) the moving party’s reason for the delay; and (3) the resulting prejudice to the responding party.” *Mountain America Credit Union v. McClellan*, 854 P.2d 590, 593 (Utah 1993) (citation omitted) (affirming denial of leave to amend because of delay).

The Utah Uniform Trade Secret Act, Utah Code Ann. § 13-24-1, *et seq.*, provides that “a complainant is entitled to recover damages for misappropriation.” Utah Code Ann. § 13-24-4(1). Under the statute, “misappropriation” means

- (a) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (b) disclosure or use of a trade secret of another without express or implied consent by a person who:
 - (i) used improper means to acquire knowledge of the trade secret; or

(ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:

(A) derived from or through a person who had utilized improper means to acquire it;

(B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

Utah Code Ann. § 13-24-2(2). “Improper means” is defined to include “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” Utah Code Ann. § 13-24-2(1).

Appellants do not even generally allege that that MegaDyne “misappropriated” any trade secrets as that term is defined in the statute. Rather, Appellants only allege that the purported trade secrets were disclosed in the context of patent litigation MegaDyne prosecuted against third parties. Appellants do not allege that MegaDyne obtained the trade secrets through any “improper means,” that MegaDyne violated any court order protecting such information from use or disclosure, or that MegaDyne obtained the alleged trade secrets without Appellants’ express or implied consent. In fact, Appellants do not even assert that the trade secrets were utilized by MegaDyne for any purpose other than the litigation.

Appellants’ allegations that MegaDyne lawfully obtained information from them in the course of litigation against a third party does not come close to meeting the

definition of misappropriation of a trade secret by improper means as required by the Utah Uniform Trade Secret Act. Therefore, Appellants' motion to amend their Complaints to add the proposed eighth claim for relief for violation of the trade secret act should be denied.

B. Appellants' Proposed Amendment Was Untimely and Prejudicial to MegaDyne.

Additionally, Appellants' motion to amend was untimely. Appellants filed their initial, 1998 Complaint 9-1/2 years ago, and filed the subsequent 2003 Complaint in a separate action almost five years ago. Appellants' delay is unreasonable, and Appellants do not provide any reasonable justification for the delay. The District Court did not abuse its discretion by denying a motion for leave to amend filed 9-1/2 years after the litigation began.

CONCLUSION

For the foregoing reasons, MegaDyne respectfully requests that the Court of Appeals affirm the District Court's March 6, 2008 Order striking Appellants' jury demand for the period of time covered by the Special Master's Report and deny Appellants leave to file an amended Complaint, and remand the case to the trial court for the evidentiary hearing regarding the substance of the Special Master's report that the District Court ordered.

RESPECTFULLY SUBMITTED this 4th day of February, 2009.

A handwritten signature in black ink, appearing to read "George M. Haley", is written over a horizontal line.

HOLME ROBERTS & OWEN LLP

George M. Haley

David R. Parkinson

J. Andrew Sjoblom

Attorneys for MegaDyne Medical Products, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of February, 2009, a true and correct copy of the foregoing **BRIEF OF APPELLEE MEGADYNE MEDICAL PRODUCTS, INC.** was served via U.S. mail, postage prepaid, to the following:

Dale F. Gardiner
VanCott Bagley Cornwall & McCarthy
36 South State Street, Suite
Salt Lake City, Utah 84111
Attorneys for Petitioners/Plaintiffs

A handwritten signature in cursive script, appearing to read "Dale F. Gardiner", is written over a horizontal line.

Addenda

Tab 1

Utah Rule of Civil Procedure 53. Masters.

(a) *Appointment and compensation.* Any or all of the issues in an action may be referred by the court to a master upon the written consent of the parties, or the court may appoint a master in an action, in accordance with the provisions of Subdivision (b) of this rule. As used in these rules the word “master” includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) *Reference.* A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall, in the absence of the written consent of the parties, be made only upon a showing that some exceptional condition requires it.

(c) *Powers.* The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master’s report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Utah Rules of Evidence for a court sitting without a jury.

(d) *Proceedings.*

(1) *Meetings.* When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to

proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) *Witnesses.* The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) *Statement of accounts.* When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) *Report.*

(1) *Contents and filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *In non-jury actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) *In jury actions.* In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) *Stipulation as to findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) *Draft report.* Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(f) *Objections to appointment of master.* A party may object to the appointment of any person as a master on the same grounds as a party may challenge for cause any prospective trial juror in the trial of a civil action. Such objections must be heard and disposed of by the court in the same manner as a motion.

Tab 2

Utah Code Ann. § 13-24-1. Short title

This chapter is known as the “Uniform Trade Secrets Act.”

Utah Code Ann. § 13-24-2. Definitions

As used in this chapter, unless the context requires otherwise:

(1) “Improper means” includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

(2) “Misappropriation” means:

(a) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(b) disclosure or use of a trade secret of another without express or implied consent by a person who:

(i) used improper means to acquire knowledge of the trade secret; or

(ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:

(A) derived from or through a person who had utilized improper means to acquire it;

(B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(3) “Person” means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(4) “Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Utah Code Ann. § 13-24-3. Injunctive relief

(1) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

(2) In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

(3) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

Utah Code Ann. § 13-24-4. Damages

(1) Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

(2) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under Subsection (1).

Tab 3

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

APPEALED: CASE #20080459

KENNETH L FAILOR vs. MEGADYNE MEDICAL PRODUCTS

CASE NUMBER 980907641 Contracts

CURRENT ASSIGNED JUDGE
L A DEVER

PARTIES

Plaintiff - PREMIUM PLASTICS INC

Plaintiff - HARVEY VANEPPS JR GILMER

Other Party - JOHN W CURRAN

Plaintiff - KENNETH L FAILOR
Represented by: DALE F GARDINER
Represented by: JENNIE B GARNER

Defendant - MEGADYNE MEDICAL PRODUCTS
Represented by: GEORGE M HALEY

Defendant - MEGADYNE MEDICAL PRODUCTS
Represented by: DAVID R PARKINSON

Defendant - MEGADYNE MEDICAL PRODUCTS
Represented by: J ANDREW SJOBLUM

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	538.50
	Amount Paid:	538.50
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COMPLAINT - NO AMT S

	Amount Due:	120.00
	Amount Paid:	120.00
	Amount Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: JURY DEMAND - CIVIL

	Amount Due:	50.00
	Amount Paid:	50.00
	Amount Credit:	0.00
	Balance:	0.00

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CASE NUMBER 980907641 Contracts

REVENUE DETAIL - TYPE: COUNTER 10K-MORE

Amount Due:	90.00
Amount Paid:	90.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: VIDEO TAPE COPY

Amount Due:	15.00
Amount Paid:	15.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	0.25
Amount Paid:	0.25
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	1.50
Amount Paid:	1.50
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	2.50
Amount Paid:	2.50
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: VIDEO TAPE COPY

Amount Due:	15.00
Amount Paid:	15.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: VIDEO TAPE COPY

Amount Due:	30.00
Amount Paid:	30.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: VIDEO TAPE COPY

Amount Due:	15.00
Amount Paid:	15.00
Amount Credit:	0.00
Balance:	0.00

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CASE NUMBER 980907641 Contracts

REVENUE DETAIL - TYPE: COPY FEE
Amount Due: 0.75
Amount Paid: 0.75
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: COPY FEE
Amount Due: 2.50
Amount Paid: 2.50
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: COPY FEE
Amount Due: 3.00
Amount Paid: 3.00
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: COPY FEE
Amount Due: 1.00
Amount Paid: 1.00
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: COPY FEE
Amount Due: 1.00
Amount Paid: 1.00
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: VIDEO TAPE COPY
Amount Due: 15.00
Amount Paid: 15.00
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: COPY FEE
Amount Due: 0.25
Amount Paid: 0.25
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: VIDEO TAPE COPY
Amount Due: 15.00
Amount Paid: 15.00
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: COPY FEE

CASE NUMBER 980907641 Contracts

Amount Due:	1.50
Amount Paid:	1.50
Amount Credit:	0.00
Balance:	0.00
REVENUE DETAIL - TYPE: COPY FEE	
Amount Due:	0.75
Amount Paid:	0.75
Amount Credit:	0.00
Balance:	0.00
REVENUE DETAIL - TYPE: COPY FEE	
Amount Due:	0.75
Amount Paid:	0.75
Amount Credit:	0.00
Balance:	0.00
REVENUE DETAIL - TYPE: COPY FEE	
Amount Due:	0.75
Amount Paid:	0.75
Amount Credit:	0.00
Balance:	0.00
REVENUE DETAIL - TYPE: COPY FEE	
Amount Due:	4.00
Amount Paid:	4.00
Amount Credit:	0.00
Balance:	0.00
REVENUE DETAIL - TYPE: VIDEO TAPE COPY	
Amount Due:	15.00
Amount Paid:	15.00
Amount Credit:	0.00
Balance:	0.00
REVENUE DETAIL - TYPE: VIDEO TAPE COPY	
Amount Due:	15.00
Amount Paid:	15.00
Amount Credit:	0.00
Balance:	0.00
REVENUE DETAIL - TYPE: COPY FEE	
Amount Due:	1.75
Amount Paid:	1.75
Amount Credit:	0.00
Balance:	0.00
REVENUE DETAIL - TYPE: COPY FEE	
Amount Due:	1.25

Amount Paid:	1.25
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: VIDEO TAPE COPY

Amount Due:	15.00
Amount Paid:	15.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFIED COPIES

Amount Due:	2.50
Amount Paid:	2.50
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFICATION

Amount Due:	4.00
Amount Paid:	4.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	1.00
Amount Paid:	1.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	9.50
Amount Paid:	9.50
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: AUDIO TAPE COPY

Amount Due:	10.00
Amount Paid:	10.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	2.25
Amount Paid:	2.25
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	0.50
Amount Paid:	0.50

Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	29.25
Amount Paid:	29.25
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	6.50
Amount Paid:	6.50
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: AUDIO TAPE COPY

Amount Due:	10.00
Amount Paid:	10.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: SPECIAL SEARCHES

Amount Due:	11.25
Amount Paid:	11.25
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	18.25
Amount Paid:	18.25
Amount Credit:	0.00
Balance:	0.00

CASE NOTE

PROCEEDINGS

07-31-98 Filed: Complaint
 07-31-98 Judge WILLIAM A THORNE assigned.
 07-31-98 Filed: Complaint No Amount
 07-31-98 Fee Account created Total Due: 120.00
 07-31-98 Fee Account created Total Due: 50.00
 07-31-98 Filed: Demand Civil Jury
 07-31-98 COMPLAINT - NO AMT S Payment Received: 120.00
 Note: Code Description: COMPLAINT-NO AMT SPC; Code
 Description: DEMAND CIVIL JURY
 07-31-98 JURY DEMAND - CIVIL Payment Received: 50.00
 08-21-98 Filed: Answer and Counterclaim or Megadyne Medical Products,

Inc.

08-21-98 Filed: Answer and counterclaim
MEGADYNE MEDICAL PRODUCTS

08-21-98 Filed: Counter 10K-MORE

08-21-98 Fee Account created	Total Due:	90.00
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08-21-98 COUNTER 10K-MORE	Payment Received:	90.00
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Note: Code Description: COUNTER 10K-MORE

09-01-98 Filed: Reply to Counterclaim
MEGADYNE MEDICAL PRODUCTS
HARVEY VANEPPS JR GILMER

09-03-98 Filed: Reply to the Counterclaim

09-09-98 Filed order: Order Authorizing the Issuance of a Subpoena Duces
Tecum

Commissioner THOMAS N ARNETT JR
Signed September 09, 1998

09-09-98 Filed: Plaintiff's Ex Parte Application for an Order
Authorizing the Issuance of an Out-of-State Subpoena Duces
Tecum

12-11-98 Filed: Motion for Appointment of A Special Master

12-11-98 Filed: Consent to Appointment of a Special Master

02-10-99 Filed: Affidavit of Impartiality

02-11-99 Filed: Affidavit of Impartiality

02-12-99 Filed order: Order of Reference

Judge WILLIAM A THORNE
Signed February 11, 1999

03-23-99 Filed: Plaintiff's Proposed Work Plan

06-21-99 Filed: Notice of Withdrawal of Counsel

06-21-99 Filed: Certificate of Service

06-21-99 Filed: Notice of Change of Counsel's Firm and Address

07-09-99 Filed: Certificate of Service

08-20-99 Filed: Plaintiff's Motion to Compel Production of Documents

08-20-99 Filed: Memorandum in Support of Plaintiff's Motion to Compel
Production of Documents

08-30-99 Filed: Response to Plaintiff's Motion to Compel Production of Documents

09-03-99 Filed: Objection to the Special Master's Invoice

09-10-99 Filed: Notice to Submit for Decision

09-10-99 Filed: Reply Memorandum in Support of Plaintiff's Motion to
Compel Production of Documents

09-13-99 Note: File sent to Judge Thorne's Law Clerk with notice to submit

10-01-99 Minute Entry - MINUTE ENTRY

Judge: THORNE, WILLIAM A

Clerk: yvetted

The plaintiff's motion to compel production of documents has come before this Court pursuant to Rule 4-501. The Court being fully advised on the matter now GRANTS the plaintiff's motion as follows:

allowed to personally review the requested documents, under appropriate safe guards. 2. Furthermore, the defendants do not need to pay for the expense of copying all of the documents requested, as long as they make copies of all the requested documents available. 3. Counsel for plaintiff is instructed to prepare an Order consistent with this Minute Entry and Rule 4-504(2).

Judge THORNE, WILLIAM A

11-01-99 Filed order: Order
Judge WILLIAM A THORNE
Signed October 29, 1999
11-04-99 Filed: Memorandum in Support of Motion to Vacate Order of
Reference Appointing Special Master
11-05-99 Filed: Motion to Vacate Order of Reference Appointing Special
Master
11-10-99 Filed: Objection to the Special Master's Invoice
11-12-99 Filed: Memorandum in Opposition to motion to Vacate Order of
Reference Appointing Special Master
11-15-99 Filed: Response to Objection to the Special Master's Invoice
11-22-99 Filed: Response to Motion to Vacate Order of Reference
Appointing Special Master
12-06-99 Filed: Affidavit of Kenneth L Failor
12-06-99 Filed: Reply Memorandum in Support of Motion to Vacate Order of
Reference Appointing Special master and in Support of
Objections to the Special Master's Invoices (oral argument
requested)
02-17-00 Filed: Notice to Submit for Decision
02-22-00 MOTION-VACATE ORDER OF REFER scheduled on March 16, 2000 at
09:00 AM in Third Floor - W38 with Judge THORNE.
03-08-00 Filed: Letter from Snow, Christensen & Martineau.
03-16-00 Minute Entry - Minutes for TELEPHONE/SCHEDULING CONF
Judge: WILLIAM A. THORNE
Clerk: cheril
TELEPHONE CONFERENCE
PRESENT

Plaintiff's Attorney(s): DAVID MAGRATH
Defendant's Attorney(s): HAROLD G. CHRISTENSEN
Tape Number: Chambers

HEARING

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CASE NUMBER 980907641 Contracts

TAPE: Chambers No resolution at this time

Case scheduled for Arguments on Motions 3-23-00 @ 3:00
 ARGUMENTS ON MOTIONS is scheduled.

Date: 03/23/2000

Time: 03:00 p.m.

Location: Third Floor - W38

THIRD DISTRICT COURT

450 SOUTH STATE

SLC, UT 84111-1860

Before Judge: WILLIAM A. THORNE

03-16-00 ARGUMENTS ON MOTIONS scheduled on March 23, 2000 at 03:00 PM in
 Third Floor - W38 with Judge THORNE.

03-20-00 Filed: Notice of Hearing

03-21-00 Filed: Affidavit of Harvey Van Epps Gilmore, JR.

03-23-00 Minute Entry - Minutes for ARGUMENTS ON MOTIONS

Judge: WILLIAM A. THORNE

Clerk: cheril

PRESENT

Plaintiff(s): HARVEY VANEPPS JR GILMER

KENNETH L FAILOR

Plaintiff's Attorney(s): DALE F. GARDINER

Defendant's Attorney(s): HAROLD G. CHRISTENSEN

Other Parties: EARNEST YOUNG

Video

Tape Number: video Tape Count: 3:10 24

HEARING

TAPE: 3:10 COUNT: 24

Courts Ruling:

Order of reference will not be withdrawn.

All conditions read into record

Attorney Harold Christensen to prepare order

04-03-00 Fee Account created Total Due: 15.00

04-03-00 VIDEO TAPE COPY Payment Received: 15.00

04-27-00 Filed: Transcript of hearing on 3/23/00

05-17-00 Filed: Objection to Defendant's Stipulation, Motion and Order

05-18-00 Fee Account created Total Due: 0.25

05-18-00 COPY FEE Payment Received: 0.25

05-19-00 Filed: Response to Plaintiffs' Objection to Defendant's
 Stipulation Motion and Order

05-23-00 Filed order: Stipulation, Motion and Order.

Judge WILLIAM A THORNE

Signed May 23, 2000

05-23-00 Filed: Correspondence Regarding Work to be Completed and

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CASE NUMBER 980907641 Contracts

Estimated Time of Completion.

05-26-00 Filed: Memorandum in Support of Plaintiffs' Renewed Motion to
 Vacate Order of Reference

05-26-00 Filed: Plaintiffs' Renewed Motion to Vacate Order of Reference
 05-30-00 Filed: Response to Plaintiffs' Objection to Defendant's
 Stipulation Motion and Order.
 05-31-00 Filed: Special Master Invoices From October 1, 1999 to may
 23,2000.
 06-07-00 Filed: Objection to the Special Master's May 30,2000 Invoices.
 06-09-00 Filed: Notice to Submit for Decision.
 06-09-00 Filed: Reply Memornadum in Support of Plaintiffs' Renewed
 Motion to Vacage Order of Reference.
 06-13-00 Filed: Request for Hearing
 06-14-00 TELEPHONE/SCHEDULING CONF scheduled on July 19, 2000 at 09:30
 AM in Third Floor - W37 with Judge DEVER.
 06-16-00 Filed: Report of Special Master.
 06-23-00 Filed: Response to Objection to the Special Master's mMay
 30,2000 Invoices.
 06-26-00 Filed: Transcript Matthias Sansom.
 06-26-00 Filed: Transcript Joann Hall.
 06-26-00 Filed: Transcript Brian Wlater.
 06-27-00 Note: Calendar Judge assignment changed from L. A. DEVER to
 PAUL G. MAUGHAN for appearance on 07/19/2000
 06-29-00 Filed: Response to Plaintiff's Objections to the Special
 Master's may 30, 2000 Invoices.
 07-03-00 Judge L A DEVER assigned.
 07-05-00 Note: Calendar Judge assignment changed from PAUL G. MAUGHAN to
 L. A. DEVER for appearance on 07/19/2000
 07-05-00 Note: TELEPHONE/SCHEDULING CONF calendar modified.
 07-06-00 Filed: Plaintiff's objections and recommendations to the master
 concerning his report
 07-10-00 Filed: Notice to Submit
 07-11-00 Fee Account created Total Due: 1.50
 07-11-00 COPY FEE Payment Received: 1.50
 07-18-00 Filed: Motion to the presiding Judge Noel to reassign the case
 07-18-00 Filed: memorandum in support of motion to the presiding Judge
 Noel to re-assign the case
 07-18-00 Filed: Memo in support of motion to the presiding judge,
 Honorable Frank G. Noel, of the third Judicial District court
 to reassign the case
 07-18-00 Filed: Motion to the Presiding Judge, Honorable Frank G. Noel,
 of the 3rd Judicial District court to reassign the case
 07-19-00 Note: Dever/dp Clerk spoke with atty Dale Gardiner by phone.
 He did not wish to proceed with the conference since he has
 filed a Motion with regards to how Judge Dever was assigned to
 this case. He would like the presiding Judge Noel to make a
 decision
 07-19-00 Note: with regards to his motion before the case continues.
 07-26-00 Filed: Response to Pltfs Objections and Recommendations to the

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 Master concerning His Report

07-28-00 Filed: Copy of Administrative Order (mailed to respective
 counsel and Special Masters this date)
 07-28-00 Filed: Response to motion to the presiding Judge, Honorable

Frank G. Noel, of the Third District Court to reassign the case

07-28-00 Filed: Certificate of service

08-01-00 Filed: Motion to strike deft's response to plf's objections and recommendations to the master concerning his report

08-01-00 Filed: memorandum in support of motion to strike deft's response to plf's objections and recommendations to the master concerning his report

08-01-00 Filed: reply memorandum in support of motion to reassign case

08-03-00 Filed: final report of special master

08-03-00 Filed: Special Master response to plf's and deft objections and recommendations to the report of Special Master

08-09-00 Note: Dever/dp On recommendation of Judge Dever's Law clerk Yvette, case to be set for a Telephone Scheduling Conference so Judge Dever can schedule Oral Arguments on pending motions.

08-09-00 Notice - NOTICE for Case 980907641 ID 657250
TELEPHONE CONFERENCE is scheduled.
Date: 09/18/2000
Time: 09:00 a.m.
Location: Third Floor - W37
THIRD DISTRICT COURT
450 SOUTH STATE STREET
SLC, UT 84111-1860
Before Judge: L. A. DEVER

08-09-00 TELEPHONE CONFERENCE scheduled on September 18, 2000 at 09:00 AM in Third Floor - W37 with Judge DEVER.

08-15-00 Filed: Stipulation and Motion

08-18-00 Filed: Plaintiff's objections to the final report of the special master

08-18-00 Filed: Request for continuance on defendant's motion for rule 37 sanctions and motion for summary judgment

08-23-00 Filed order: order extending time
Judge L A DEVER
Signed August 20, 2000

08-23-00 Filed: Notice of deposition of Brian Walter

08-29-00 Filed: Notice of withdrawal of counsel, David M. McGrath

08-30-00 Filed: Defendant Megadyne's Motion for Protective Order

08-30-00 Filed: Motion to Strike Jury Demand and for Judgment on the Special Master's Final Report

08-30-00 Filed: Memorandum in Support of Motion to Strike Jury Demand and for Judgment on the Special Master's Final Report

08-30-00 Filed: Defendant Megadyne's Memorandum in Support of Motion for Protective Order

08-31-00 Filed: Defendant's Response to Plaintiffs' Objections to the Final Report of the Special Master

09-01-00 Filed: Motion to strike the special master's response to

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plaintiffs' objections and recommendation to the report of special master

09-01-00 Filed: Memorandum in support of motion to strike special master's response to plaintiffs' objections and recommendations to the report of special master

09-18-00 Notice - NOTICE for Case 980907641 ID 681222

ORAL ARGUMENTS is scheduled.

Date: 10/25/2000

Time: 02:00 p.m.

Location: Third Floor - W37

THIRD DISTRICT COURT

450 SOUTH STATE STREET

SLC, UT 84111-1860

before Judge L. A. DEVER

09-18-00 Notice - NOTICE for Case 980907641 ID 2681222

ORAL ARGUMENTS is scheduled.

Date: 10/25/2000

Time: 02:00 p.m.

Location: Third Floor - W37

THIRD DISTRICT COURT

450 SOUTH STATE STREET

SLC, UT 84111-1860

before Judge L. A. DEVER

09-18-00 Minute Entry - Minutes for TELEPHONE CONFERENCE

Judge: L. A. DEVER

Clerk: kathrynb

TELEPHONE CONFERENCE

PRESENT

Plaintiff's Attorney(s): DALE F. GARDINER

Defendant's Attorney(s): HAROLD G. CHRISTENSEN

JOHN CURRAN

Video

Tape Number: OFF

HEARING

C/O Set for Oral Arguments on 10/25/2000 at 2:00 pm (1/2 day hearing)

ORAL ARGUMENTS is scheduled.

Date: 10/25/2000

Time: 02:00 p.m.

Location: Third Floor - W37

THIRD DISTRICT COURT

450 SOUTH STATE STREET

SLC, UT 84111-1860

before Judge L. A. DEVER

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CASE NUMBER 980907641 Contracts

09-18-00 ORAL ARGUMENTS scheduled on October 25, 2000 at 02:00 PM in Third Floor - W37 with Judge DEVER.

09-29-00 Filed: memorandum in opposition to deft's motion to strike jury demand and for judgment on the special master's final report

09-29-00 Filed: memorandum in opposition to deft's motion for protective order

10-10-00 Filed: memorandum in support of plf's motion to reject the
master's report
10-10-00 Filed: Motion to reject the master's report
10-23-00 Filed: Memorandum in opposition to motion to reject the
master's report
10-23-00 Filed: Reply to expert report prepared by Campos & Stratis
10-23-00 Filed: Letter from Dale Gardiner and courtesy copy of
Plaintiffs' memorandum in opposition to defendant's motion for
protective order.
10-25-00 Minute Entry - Minutes for ORAL ARGUMENTS - 8 MOTIONS
Judge: L. A. DEVER
Clerk: kathrynb
PRESENT

Plaintiff's Attorney(s): DALE F. GARDINER
Defendant's Attorney(s): HAROLD G. CHRISTENSEN
RODNEY PARKER

Video
Tape Number: 10/25/2000 Tape Count: 2:09:30

HEARING

COUNT: 2:10:0

This case came on regularly before the Court for Oral Arguments on
8 Motions:

1. Plaintiff's Renewed Motion to Vacate the Order Appointing the
Special Master
2. Plaintiff's Objections to the Master's Invoices
3. Plaintiff's Objections and Recommendations to the Master
Concerning his Report
4. Plaintiff's Motion to Strike the Defendant's Response to
Plaintiff's Objections & Recommendations to the Special Master
5. Defendant's Motion to Strike the Plaintiff's Jury Demand and
for Judgment on the Final Report
6. Defendant's Motion for Protective Order
7. Plaintiff's Motion to Strike the Special Master's Responses to
Plaintiff's Objections and Recommendations
8. Plaintiff's Motion to Strike and Reject the Master's Final
Report

COUNT: 2:10:4

Arguments re: Renewed Motion to Vacate the Order Appointing the

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Special Master (ATP Gardiner)
COUNT: 2:13:3
Comments - ATD Christensen
COUNT: 2:14:0
Arguments continue - ATP Gardiner
COUNT: 2:18:4
Arguments - ATD Christensen

COUNT: 2:19:3
 Comments and objection - ATP Gardiner
 COUNT: 2:19:5
 Defense arguments continues
 COUNT: 2:20:4
 Arguments re: Jury Trial issue and Master's Report - ATP Gardiner
 COUNT: 2:31:0
 Arguments - ATD Christensen
 COUNT: 2:56:5
 Final Arguments - ATD Christensen
 COUNT: 2:58:1
 Response - ATP Gardiner
 COUNT: 3:02:
 The Court takes these matters under advisement
 COUNT: 3:03:4
 ATP Gardiner wants to know if Motion for Protective Order should be heard
 COUNT: 3:30:5
 The Court will hear this Motion while all parties are present
 COUNT: 3:04:0
 Arguments - ATP Gardiner
 COUNT: 3:18:3
 Response and Arguments - ATD Rodney Parker
 COUNT: 3:25:4
 The Court heard from the Special Masters - they are allowed to comment on criticisms expressed today
 COUNT: 3:34:5
 Correction of Record - ATP Gardiner
 COUNT: 3:3:0
 The Court takes these matters under advisement - There may be need to have some additional hearings. Parties will be notified.

10-25-00 TUA CASE - REFER TO LAD scheduled on December 27, 2000 at 08:00 AM in Third Floor - W37 with Judge DEVER.
 11-15-00 Fee Account created Total Due: 2.50
 11-15-00 COPY FEE Payment Received: 2.50
 11-27-00 Fee Account created Total Due: 15.00
 11-27-00 VIDEO TAPE COPY Payment Received: 15.00
 11-27-00 Fee Account created Total Due: 30.00
 11-27-00 VIDEO TAPE COPY Payment Received: 30.00
 12-13-00 Filed: ENTRY OF APPEARANCE - DALE F GARDINER
 12-19-00 Filed: Motion for Rule 37 sanctions

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CASE NUMBER 980907641 Contracts

12-19-00 Filed: memorandum of points and authorities in support of motion for Rule 37 sanctions
 12-22-00 Filed: Memo in support of Motion for Leave to Depose the Master
 12-22-00 Filed: Pltfs Motion for Leave to Depose the Master (hearing requested)
 12-27-00 Fee Account created Total Due: 15.00
 12-27-00 VIDEO TAPE COPY Payment Received: 15.00
 12-28-00 Filed: Motion to quash

12-28-00 Filed: Memorandum in support of motion to quash
 12-28-00 Filed: subpoena duces tecum
 01-02-01 Filed: dedft Megadyne's memorandum in opposition to motion for Rule 37 sanctions
 01-03-01 Filed: Transcript of hearing 10-25-00
 01-04-01 Filed: subpoena duces tecum on return (served)
 01-16-01 Filed: subpoena duces tecum on return (served)
 01-16-01 Filed: memorandum in opposition to deft's motion to quash
 01-16-01 Filed: reply memorandum in support of motion for Rule 37 sanctions
 01-18-01 Filed: Notice to submit for decision
 01-18-01 Filed: Notice to submit for decision
 01-22-01 Filed: letter from atty Rodney Parker regarding a motion that was filed with the court. and also a notice to submit
 01-26-01 Filed: reply to plf's memorandum in opposition to Megadyne's motion to quash
 02-05-01 Filed: memorandum in opposition to motion for leave to depose the master
 02-15-01 Filed: reply memorandum in support of motion for leave to depose the master (hearing requested)
 02-21-01 Filed: special master invoices from May 24,2000 to October 31,2000
 02-28-01 Filed: Objections to the special master's invoices from may 24,2000 to October 31,2000
 03-05-01 Filed: Corrected Reply Memorandum in Support of Motin for Leave to Depose the Master
 03-06-01 Fee Account created Total Due: 0.75
 03-06-01 COPY FEE Payment Received: 0.75
 04-16-01 Filed: Notice to Submit for Decision (Motion to Quash)
 04-16-01 Filed: Notice to Submit (Motion to Strike the Special Master's Response to the Plaintiffs' Objections and Recommendations to the Report of the Special Master)
 04-16-01 Filed: Notice to Submit (Motion to Strike the defendant's response to the plaintiffs' objections and recommenndations to the master concerning his report)
 04-16-01 Filed: Notice to Submit (Motion to Reject the Master's Report)
 04-16-01 Filed: renewed notice to submit and request for oral argument
 04-16-01 Filed: reply memorandum in support of plf's motion to reject the master's report
 04-24-01 Note: LAD/KB Judge Dever instructs to set this case for Oral Arguments on the three (3) motions pending

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CASE NUMBER 980907641 Contracts

04-24-01 Notice - NOTICE for Case 980907641 ID 827098
 ORAL ARGUMENTS - 3 MOTIONS is scheduled.
 Date: 06/04/2001
 Time: 09:30 a.m.
 Location: Third Floor - W37
 THIRD DISTRICT COURT
 450 SOUTH STATE STREET
 SLC, UT 84111-1860
 Before Judge: L. A. DEVER

This hearing is set for Oral Arguments on the three (3) Motions pending: 1) Plaintiff's renewed Motion to Vacate the Order of Reference; 2) Plaintiffs' Motion for Leave to Depose the Master; and 3) Plaintiffs' Motion for Rule 37 Sanctions

04-24-01 ORAL ARGUMENTS - 3 MOTIONS scheduled on June 04, 2001 at 09:30 AM in Third Floor - W37 with Judge DEVER.

05-29-01 Fee Account created	Total Due:	2.50
05-29-01 COPY FEE	Payment Received:	2.50
05-29-01 Filed: Motion for OSC		
05-29-01 Filed: memorandum in support of motion for OSC		
05-29-01 Fee Account created	Total Due:	3.00
05-29-01 COPY FEE	Payment Received:	3.00
05-29-01 Fee Account created	Total Due:	1.00
05-29-01 COPY FEE	Payment Received:	1.00
06-01-01 Filed: memorandum in opposition to motion for osc		
06-04-01 Fee Account created	Total Due:	1.00
06-04-01 COPY FEE	Payment Received:	1.00
06-04-01 Minute Entry - Minutes for Law & Motion		
Judge: L. A. DEVER		
Clerk: debbiep		
PRESENT		

Plaintiff's Attorney(s): DALE F. GARDINER
 Defendant's Attorney(s): HAROLD G. CHRISTENSEN
 Video

Tape Count: 9-37-19

HEARING

Plf's motion to revoke order of reference in the Master's report was argued. Response by atty for deflt's. The decision of the court is as follows: The court will not revoke order, the court orders that the deflt allow the Plf's to review all documents by the master. Plf has 60 days to review and an additional 14 days to file or submit any motions or memorandums to the court pertaining to the reports.

06-07-01 Fee Account created	Total Due:	15.00
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CASE NUMBER 980907641 Contracts

06-07-01 VIDEO TAPE COPY	Payment Received:	15.00
06-13-01 Filed: Reply memorandum in support of motion for order to show cause		
06-14-01 Filed: notice to submit		
06-18-01 Fee Account created	Total Due:	0.25
06-18-01 COPY FEE	Payment Received:	0.25
06-20-01 Filed: Transcript of hearing 6-4-01		
06-21-01 Fee Account created	Total Due:	15.00
06-21-01 VIDEO TAPE COPY	Payment Received:	15.00
07-03-01 Filed: objections to deflt's proposed order and protective order		

07-06-01 Filed: memorandum in opposition to objections to deft's proposed order and protective order

07-12-01 TELEPHONE CONFERENCE scheduled on July 17, 2001 at 09:30 AM in Third Floor - W37 with Judge DEVER.

07-12-01 Note: Per request of Atty Randy Allen and stipulation of Atty Rodney Parker, clerk cleared date of 7/17/2001 at 9:30 a.m. for telephone conference.

07-17-01 Minute Entry - Minutes for MINUTE ENTRY CONFERENCE CALL
 Judge: L. A. DEVER
 Clerk: ldever
 PRESENT

Plaintiff's Attorney(s): DALE F. GARDINER
 RANDALL ALLEN

Defendant's Attorney(s): RODNEY PARKER

Video

Tape Number: off

HEARING

Plaintiff's request to share tax returns, profitability, and costs of products with the individual parties is denied. These items are only to be viewed by Counsel and their accountants. The returns are not to be copied.

All pending motions are stayed until discovery is completed or until the parties notify the Court otherwise.

The protective order previously submitted will be issued with the stipulated correction to paragraph eight that the materials covered by the Protective Order may be used at Motion Hearings.

07-19-01 Filed order: ORDER Re: Renewed Motion to Vacate, Motion for Leave to Depose the Master, and Motion for Rule 37 Sanctions
 Judge L A DEVER
 Signed July 17, 2001

07-19-01 Filed order: PROTECTIVE ORDER
 Judge L A DEVER
 Signed July 18, 2001

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07-19-01 Note: Clerk mailed Certificate of Notification of Order and Protective Order to Counsel

08-06-01 Fee Account created Total Due: 1.50

08-06-01 COPY FEE Payment Received: 1.50

08-14-01 Filed: certificate of service

08-14-01 Filed: certificate of service

08-22-01 Filed order: Stipulation and Order
 Judge L A DEVER
 Signed August 20, 2001

08-22-01 Filed: certificate of service

08-24-01 Fee Account created Total Due: 0.75

08-24-01	COPY FEE	Payment Received:	0.75
09-14-01	Filed order: stipulation and order		
	Judge L A DEVER		
	Signed September 14, 2001		
09-20-01	Fee Account created	Total Due:	0.75
09-20-01	COPY FEE	Payment Received:	0.75
09-20-01	Filed: certificate of service		
10-11-01	Fee Account created	Total Due:	0.75
10-11-01	COPY FEE	Payment Received:	0.75
10-11-01	Filed order: Stipulation and Order		
	Judge L A DEVER		
	Signed October 11, 2001		
10-17-01	Filed: Memorandum in Support of the Plaintiffs' Motion to Compel		
10-17-01	Filed: Plaintiffs' Renewed Motion to Vacate the Order of Preference		
10-17-01	Filed: Memorandum in Support of Plaintiffs' Renewed Motion to Depose the Master		
10-17-01	Filed: Renewed Motion for Leave to Depose the Master		
10-17-01	Filed: Memorandum in Support of the Plaintiffs' Motion for an Evidentiary Hearing		
10-17-01	Filed: Memorandum in Support of the Plaintiffs' Renewed Motion to Vacate the Order of Reference		
10-17-01	Filed: Motion for Evidentiary Hearing		
10-17-01	Filed: Motion to Allow of Harvey Gilmer and Kenneth L. Failor to Inspect Megadyne's Tax Returns and Financial Statements		
10-17-01	Filed: Renewed Motion to Reject the Master's Report		
10-17-01	Filed: Memorandum in Support of the Plaintiffs' Renewed Motion to Reject the Master's Report		
10-17-01	Filed: Affidavit of Derk Rasmussen		
10-17-01	Filed: Motion to Compel		
10-17-01	Filed: Memorandum in Support of the Plaintiffs' Motion to Allow Harvey Gilmer and Kenneth L. Failor to Inspect Megadyne's Tax Returns and Financial Statements		
10-18-01	Filed: certificate of service		
10-25-01	Fee Account created	Total Due:	4.00
10-25-01	COPY FEE	Payment Received:	4.00
11-30-01	Filed: deft Megadyne's Motion for Protective Order		

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11-30-01 Filed: memorandum in opposition to motion to plfs' Motions filed October 17, 2001

11-30-01 Filed: deft Megadyne's memorandum in opposition to motion to allow Gilmer and Failor to review tax returns and financial statements

11-30-01 Filed: deft Megadyne's memorandum in opposition to Motion to Compel

12-10-01 Filed: request for oral argument

12-14-01 Notice - NOTICE for Case 980907641 ID 979174
 ARG - SEVEN PENDING MOTIONS is scheduled.
 Date: 01/24/2002
 Time: 02:00 p.m.

Location: Third Floor - S35
Third District Court
450 South State
SLC, UT 84111-1860

Before Judge: L A DEVER

This hearing is set for oral arguments on seven (7) pending motions: 1) Pltf's renewed Motion to Reject the Master's Report; 2) Pltf's Renewed Motion to Vacate the Order of Reference; 3) Pltf's Renewed Motion to Vacate the Order of Reference; 4) Pltf's Re

4) Pltf's Motion for Evidentiary Hearing; 5) Pltf's Motion to allow the Pltf's to inspect MegaDyne's Tax Returns and Financial Statements; 6) Pltf's Motion to Compel; and 7) Deft's Motion for a Protective Order.

12-14-01 ARG - SEVEN PENDING MOTIONS scheduled on January 24, 2002 at 02:00 PM in Third Floor - S35 with Judge DEVER.
12-31-01 Filed: Reply Memorandum in Support of the Plaintiffs' Renewed Motion to Vacate the Order of Reference
12-31-01 Filed: Reply Memorandum in Support of the Renewed Motion to Reject the Master's Report
12-31-01 Filed: Motion to Strike
12-31-01 Filed: Memorandum in Support of Motion Motion to Strike
12-31-01 Filed: Memorandum in Opposition to Defendant Megadyne's Motion for Protective Order
12-31-01 Filed: Reply Memorandum in Support of Plaintiffs' Motion for an Evidentiary Hearing
12-31-01 Filed: Reply Memorandum in Support of the Plaintiffs' Motion to Compel
12-31-01 Filed: Reply Memorandum in Support of Plaintiffs' Renewed Motion to Depose the Master
12-31-01 Filed: Reply Memorandum in Support of the Plaintiffs' Motion to Allow Harvey Gilmer and Kenneth L. Failor to Inspect Megadyne's Tax Returns and Financial Statements
01-04-02 Filed: Motion to require Plf's to pay expenses
01-04-02 Filed: memorandum in opposition to Motion to Strike
01-04-02 Filed: Deft Megadyne's reply memorandum in support of Motion

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for Protective Order
01-04-02 Filed: Deft Megadyne's memorandum in support of Motion to require Plf's to pay expenses
01-11-02 Filed: reply memorandum in support of Motion to Strike
01-18-02 Filed: memorandum in opposition to deft's Motion to require plf's to pay expenses
01-24-02 Minute Entry - Minutes for ARG - SEVEN PENDING MOTIONS
Judge: L A DEVER
Clerk: kathrynb
PRESENT

Plaintiff(s): KENNETH L FAILOR
Plaintiff's Attorney(s): DALE F. GARDINER

CRAIG KLINEMAN

Defendant's Attorney(s): HAROLD G. CHRISTENSEN
 RODNEY PARKER

Video

Tape Number: 1/24/2002 Tape Count: 2:01:56

HEARING

This case came on regularly before the Court for oral arguments on Plaintiff's 6 Motions.

Arguments on Plaintiff's Six (6) Motions (Atty Gardiner)

1. Renewed Motion to Vacate Order of Reference

2. Renewed Motion to Reject Master's Report

3. Plaintiff's Motion for Evidentiary Hearing

4. Plaintiff's Motion to Compel Production of Documents Identified by Megadyne Employee, Brian Walters on 4/17/2000 and 7/28/2000.

5. Plaintiff's Motion to Inspect Megadyne's Tax Returns and Financials

6. Plaintiff's Motion to Depose the Special master

Response to the first three (3) motions (Atty Christensen)

Final Arguments (Atty Christensen)

Further Response (Atty Parker)

The Court makes Ruling:

Motion #1: Renewed Motion to Vacate Order of Reference is DENIED.

Motion #2: Renewed Motion to Reject the Master's Report is DENIED.

Motion #3: Plaintiff's Motion for Evidentiary Hearing. The Evidentiary hearing may be noticed up after Mr. Rasmussen's Discovery

Motion #4: Plaintiff's Motion to Compel Production of Documents identified by Megadyne Employees. The Court allows defendant to have access to FDA Reports. Defense is to determine cost.

Motion #5: Plaintiff's Motion to Inspect Megadyne's Tax Returns and Financials. The Plaintiff cannot inspect the individual tax returns

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Motion #6: Motion to Depose the Special Master is DEFERRED.

Atty Parker is to prepare the Order

01-28-02	Fee Account created	Total Due:	15.00
01-28-02	VIDEO TAPE COPY	Payment Received:	15.00
02-04-02	Fee Account created	Total Due:	15.00
02-04-02	VIDEO TAPE COPY	Payment Received:	15.00
02-27-02	Filed: Transcript of Oral Arguments on January 24, 2002		
03-20-02	Filed: NOTICE OF PLAINTIFFS OBJECTION TO THE DEFENDANTS PROPOSED ORDER REGARDING THE HEARONG ON 1/24/02		
03-28-02	Filed: Response to Plaintiff's Objection to Proposed Order Regarding Hearing of January 24, 2002.		
04-01-02	Note: LAD/KB C/O wait for Plaintiff's Objections for signing of Order regarding hearing of 1/24/2002.		
04-12-02	Filed: notice to submit plfs' objection to proposed order		

regarding hearing of 1-24-02
 04-18-02 Minute Entry - PLAINTIFFS OBJECTION TO ORDER
 Judge: L A DEVER
 Clerk: darlac
 C/O Plaintiff's objection are denied. Order submitted by
 Defendant is signed.

Judge L A DEVER

04-18-02 Filed order: regarding hearing of January 24, 2002
 Judge L A DEVER
 Signed April 18, 2002
 04-29-02 Fee Account created Total Due: 1.75
 04-29-02 COPY FEE Payment Received: 1.75
 05-07-02 Filed: notice of plfs' petition for permission to appeal
 Interlocutory Order
 05-09-02 Filed: Letter from Supreme Court - Interlocutory Appeal filed
 5-7-02 - S.C.#20020360-sc
 06-28-02 Filed: Letter from Supreme Court - S.C.#20020360-sc - Notice of
 Decision - Order - Permission to appeal an interlocutory order
 filed on May 7, 2002 is denied
 07-12-02 Fee Account created Total Due: 1.25
 07-12-02 COPY FEE Payment Received: 1.25
 07-12-02 Filed: notice of Law Firms Change of Name
 07-18-02 Filed: memorandum in support of motion for revision of order
 pursuant to rule 54(b)
 07-18-02 Filed: motion for revision of order pursuant to rule 54(b)
 07-19-02 Filed: motion for order to show cause
 07-23-02 Filed order: OSC
 Judge L A DEVER
 Signed July 19, 2002
 07-23-02 ORDER TO SHOW CAUSE scheduled on September 09, 2002 at 02:00 PM

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in Third Floor - S35 with Judge DEVER.
 08-05-02 Filed: OSC on return (Certificate of service attached)
 08-07-02 Filed: memorandum in opposition to motion for revision of order
 pursuant to rule 54(b)
 08-12-02 Filed: Plfs' memorandum in opposition to deft Megadyne's Motion
 for OSC
 08-12-02 Filed: Motion for Rule 37 Sanctions
 08-12-02 Filed: Memorandum in support of Motion for Rule 37 Sanctions
 08-19-02 Filed: Notice to submit for decision and request to set for
 Oral Argument
 08-19-02 Filed: reply memorandum in support of motion for revision of
 order pursuant to Rule 54 (b)
 08-30-02 Filed order: order stipulation for an order setting oral
 argument

Judge L A DEVER

Signed August 30, 2002

09-03-02 Filed: Memorandum in opposition to Motion for Rule 37 sanctions
 09-03-02 Filed: Reply in support of Motion for OSC
 09-05-02 Filed: Reply Memorandum in Support of Motion for Rule 37
 Sanctions
 09-05-02 Filed: Notice to Submit for Decision
 09-09-02 Minute Entry - Minutes for ORDER TO SHOW CAUSE
 Judge: L A DEVER
 Clerk: kathrynb
 PRESENT

Plaintiff's Attorney(s): DALE F. GARDINER
 JENNIE GARNER
 Defendant's Attorney(s): HAROLD G. CHRISTENSEN
 RODNEY PARKER

Video

Tape Number: 9/9/2002 Tape Count: 2:04:22

HEARING

COUNT: 2:04:2

This case came on regularly before the Court for hearing on an
 Order to Show Cause on Defendant's Motion.

Opening Statements (Atty Gardiner)

Atty Gardiner reports that Mr. Gilmer has agreed to pay \$56,242 by
 date certain. To be determined today.

Atty Gardiner feels Rule 37 Sanctions should be entered.

Response (Atty Parker)

COUNT: 2:12

The Court questions the parties

COUNT: 2:32:1

Counsel have agreed to the following:

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1) Defense attorney will discuss the issues with Megadyne and come
 back with a proposal
 2) \$56,242 to be paid within 14 days
 3) Accountant can look at the original documents
 4) If counsel reach disagreement, then a Motion is to be filed.
 Atty Gardiner is to prepare the Order

09-09-02 Fee Account created	Total Due:	15.00
09-09-02 VIDEO TAPE COPY	Payment Received:	15.00

09-27-02 Filed: Transcript, Hearing of September 9, 2002; Beverly Lowe,
 Certified Court Transcriber, 801-377-0027; 14 pages.
 09-30-02 Filed order: Order regarding hearing of Sept 9, 2002
 Judge L A DEVER
 Signed September 29, 2002

10-22-02 Filed: Plfs' Motion for an order authorizing Kenneth L. Failor
 to personally inspect documents
 10-22-02 Filed: Memorandum in support of Plfs' Motion for an order

authorizing Kenneth L. Failor to personally inspect documents
 11-04-02 Filed: Memorandum in opposition to Motion for an order
 authorizing Kenneth L. Failor to personally inspect documents
 11-15-02 Filed: Reply memorandum in support of Plfs' motion for an order
 authorizing Kenneth L. Failor to personally inspect documents
 12-02-02 Filed: Notice of deposition
 12-11-02 Fee Account created Total Due: 2.50
 12-11-02 Fee Account created Total Due: 4.00
 12-11-02 CERTIFIED COPIES Payment Received: 2.50
 12-11-02 CERTIFICATION Payment Received: 4.00
 01-08-03 Filed: notice to submit for decision
 01-08-03 Filed: Plaintiff's motion for an order authorizing Kenneth L.
 Failor to personally inspect documents
 01-08-03 Filed: memorandum in support of Plaintiff's motion for an order
 authorizing Kenneth L. Failor to personally inspect documents
 01-31-03 Minute Entry - PLTF'S MOTION TO PERSONALLY INSPECT DOCU
 Judge: L A DEVER
 Clerk: kathrynb

The Court grants Plaintiff's Motion for Kenneth Failure to
 Personally Inspect the Documents. Kenneth Failor is authorized to
 review the subject documents with his accountants. Mr. Failure is
 not to contact any employee, he has no authority to go to any
 area except directly to the room wherein the documents are
 provided. His failure to abide by these limitations is grounds for
 terminating the review and his removal from the property.

Judge L A DEVER

02-06-03 Filed: Subpoena Duces Tecum on return (served)
 02-06-03 Filed: Subpoena Duces Tecum on return (served)

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03-25-03 Fee Account created Total Due: 1.00
 03-25-03 COPY FEE Payment Received: 1.00
 05-01-03 Filed: Plaintiffs' Motion for Rule 37 Sanctions or, in the
 Alternative, to Compel Discovery
 05-01-03 Filed: Memorandum in Support of Plaintiffs' Motion for Rule 37
 Sanctions or, in the Alternative, to Compel Discovery
 05-20-03 Filed: Memorandum in opposition to Motion for Rule 37 sanctions
 or in the alternative to compel discovery
 05-30-03 Filed: Reply memorandum in support of Motion for Rule 37
 Sanctions or, in the alternative, to compel discovery
 06-02-03 Filed: Plaintiffs' Motion to Strike Portions of Affidavit of
 Brandy K. Jenkins
 06-02-03 Filed: Memorandum in Support of Plaintiff's Motion to Strike
 Portions of the Affidavit of Brandy k. Jenkins.
 06-03-03 Filed: Notice to submit for decision and to set for Oral
 Argument
 06-12-03 Filed: Motion to consolidate

06-12-03 Filed: Memorandum in support of motion to consolidate
07-07-03 Minute Entry - MINUTE ENTRY
Judge: L A DEVER
Clerk: debbiep
See written order signed by the court
07-11-03 Filed: Plaintiffs' Memorandum in Opposition to Defendant's
Motion to Consolidate
07-23-03 Filed order: Order regarding Plfs' Motion for Rule 37 sanctions
or, in the alternative, to compel discovery
Judge L A DEVER
Signed July 22, 2003
07-23-03 Filed: Notice to Submit for Decision on Motion to consolidate
07-23-03 Filed: Reply Memorandum in support of Motion to consolidate
07-28-03 Minute Entry - MINUTE ENTRY RULING
Judge: L A DEVER
Clerk: rhondam
After review of the pleadings and upon receipt of the Notice to
Submit for Decision on Motion to Consolidate filed on July 23,
2003, the Court grants defendant's motion. Attorney for the
defendant to prepare the order.

Judge L A DEVER

08-19-03 Filed order: Order consolidating cases (030902671)
Judge L A DEVER
Signed August 19, 2003
09-29-03 Filed: Motion to extend appointment of Special Master
09-29-03 Filed: Memorandum in support of Motion to extend appointment of
Special Master

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09-29-03 Filed: Request for Oral Argument
10-24-03 Filed: Plaintiff's Memorandum in Opposition to Defendant's
Motion to Extend Appointment of Special Master
11-05-03 Minute Entry - MINUTE ENTRY RULING
Judge: L A DEVER
Clerk: rhondam
After review of the pleadings and upon receipt of Defendant's
Request for Oral Argument filed on September 29, 2003, request is
hereby granted.

Judge L A DEVER

11-05-03 Notice - NOTICE for Case 980907641 ID 5772959
ORAL ARGUMENTS is scheduled.
Date: 12/17/2003

Time: 10:00 a.m.

Location: Third Floor - S35
Third District Court
450 South State
SLC, UT 84114-1860

Before Judge: L A DEVER

Oral Arguments on Defendant's Motion to Extend Appointment of Special Master, scheduled for 30 minutes.

11-05-03 ORAL ARGUMENTS scheduled on December 17, 2003 at 10:00 AM in Third Floor - S35 with Judge DEVER.
12-12-03 Filed: Reply memorandum in support of Motion to Extend appointment of Special Master
12-15-03 Filed: Plfs' Motion to Strike untimely reply memorandum in support of Motion to Extend appointment of Special Master
12-15-03 Filed: Memorandum in support of Plfs' Motion to Strike untimely reply memorandum in support of Motion to extend appointment of Special Master
12-16-03 Filed: Notice of Plfs' counsel's change of address
12-17-03 Minute Entry - Minutes for ORAL ARGUMENTS
Judge: L A DEVER
Clerk: rhondam
PRESENT

Plaintiff's Attorney(s): DALE F GARDINER

JENNIE B GARNER

Defendant's Attorney(s): HAROLD G. CHRISTENSEN

Video

Tape Number: 1 Tape Count: 10:09-10:53

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CASE NUMBER 980907641 Contracts

HEARING

This case is before the Court for Oral Arguments regarding Defendant's Motion to Extend Appointment of Special Master. Court finds petitioner's law was well taken. The Court denies extension of appointment of Special Master.

12-30-03 Filed: Letter to Judge Dated December 24, 2003
12-31-03 Filed order: Order Denying Defendant's Motion to Extend Appointment of the Special Master
Judge L A DEVER
Signed December 31, 2003
01-30-04 Filed: Motion to require immediate return of documents (Oral Argument Requested)
01-30-04 Filed: Memorandum in support of Motion to require immediate return of documents
02-10-04 Filed return: Subpoena Duces Tecum-BIMCO, Inc.
Party Served: Jason Bingham; Vice President
Service Type: Personal

Service Date: January 30, 2004

02-10-04 Filed return: Subpoena duces Tecum-ISOMEDIX Services a division of Steris Corporation
 Party Served: Chad Toleafoa; Authorized Agent
 Service Type: Personal
 Service Date: January 30, 2004

02-10-04 Filed return: Subpoena duces Tecum-ISOMEDIX Services a division of Steris Corporation
 Party Served: Karl J. Hemmerick; Plant Manager
 Service Type: Personal
 Service Date: January 30, 2004

02-10-04 Filed return: Subpoena duces Tecum-Ellingson Industries Co.
 Party Served: Richard L. Ellingson; President
 Service Type: Personal
 Service Date: February 03, 2004

02-17-04 Filed: Plaintiffs' memorandum in opposition to Defendant's motion to require immediate return of documents

02-23-04 Filed: Notice to Submit (Request for Oral Argument) on Motion to Require Immediate Return of Documents

02-23-04 Filed: Reply in support of Motion to require immediate return of documents (request for Oral Argument)

02-26-04 Minute Entry - MINUTE ENTRY RULING AND ORDER
 Judge: L A DEVER
 Clerk: rhondam
 Motion to Require Immediate Return of Documents to the Court is granted. Request for Oral Argument is denied. Order: Originals of documents delivered to plaintiff for copying are to be returned to defendant within 24 hours of the receipt of this order.

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CASE NUMBER 980907641 Contracts

 Judge L A DEVER

03-02-04 Fee Account created	Total Due:	9.50
03-02-04 COPY FEE	Payment Received:	9.50
03-05-04 Filed: Motion for Partial Summary Judgment		
03-05-04 Filed: Memorandum in Support of Motion for Partial Summary Judgment		
03-05-04 Filed: Affidavit of Robert J. Farnsworth		
04-06-04 Filed: Plaintiffs' Motion to Strike Portions of Affidavit of Robert J. Farnsworth		
04-06-04 Filed: Rule 56 (f) Affidavit of Jennie B. Garner		
04-06-04 Filed: Plaintiffs' Memorandum in Opposition to Megadyne's Motion for Partial Summary Judgment		
04-06-04 Filed: Certificate of Service of Plaintiffs' Premium Plastics' and Harvey Van Epps Gilmer, Jr.'s Request for Production of Documents		
04-06-04 Filed: Affidavit of Kenneth L. Failor in Opposition to Megadyne's Motion for Partial Summary Judgment		

04-06-04 Filed: Affidavit of Harvey Van Epps Gilmer, Jr., in Opposition to Megadyne's Motion for Partial Summary Judgment

04-06-04 Filed: Memorandum in Support of Plaintiff's Motion to Strike Portions of the Affidavit of Robert J. Farnsworth

04-06-04 Filed: Certificate of Service of Plaintiffs' Premium Plastics' and Harvey Van Epps Gilmer, Jr.'s Interrogatories to Defendant Megadyne Medical Products

04-07-04 Filed: Certificate of Services of Plaintiffs' Premium Plastics' and Harvey Van Epps Gilmer, Jr.'s Request for Entry Upon Land for Inspection

04-16-04 Filed: Reply Memorandum in Support of Motion for Partial Summary Judgment

04-16-04 Filed: Supplemental Affidavit of Robert J. Farnsworth

04-16-04 Filed: Affidavit of Michael S. Hintze

04-16-04 Filed: Affidavit of Brian Walter

04-16-04 Filed: Affidavit of Jeffrey B. Roberts

04-16-04 Filed: Notice to Submit

04-16-04 Filed: Ex parte Application for Order Authorizing the Issuance of a Subpoena Duces Tecum

04-16-04 Filed: Affidavit of Harvey Van Epps Gilmer, Jr., in Opposition to Megadynes Motion for Partial Summary Judgment

04-19-04 Filed order: Ex Parte Order Authorizing the Issuance of a Subpoena Duces Tecum
 Judge L A DEVER
 Signed April 16, 2004

04-19-04 Filed: Response to ex parte application for order authorizing the issuance of a subpoena duces tecum

04-20-04 Filed: Opposition to Motion to Strike portions of affidavit of Robert J. Farnsworth

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CASE NUMBER 980907641 Contracts

04-22-04 Filed: Notice of Deposition

04-29-04 Filed: Request to Submit for Decision

04-29-04 Filed: Reply Memorandum in Support of Plaintiff's Motion to Strike Portions of the Affidavit of Robert J. Farnsworth

04-29-04 Filed: Certificate of Service of Plaintiffs' Premium Plastics' and Harvey Van Epps Gilmer, Jr.'s Request for Entry upon Land for Inspection

04-30-04 Filed: Plaintiffs' Motion to Strike the Affidavits of Robert J. Farnsworth, Jeffrey B. Roberts, Michael S. Hintze and Brian Walter

04-30-04 Filed: Memorandum in Support of Plaintiff's Motion to Strike the Affidavits of Robert J. Farnsworth, Jeffrey B. Roberts, Michael S. Hintze and Brian Walter

05-14-04 Filed: certificate of service of Plaintiffs' Premium Plastics' and Harvey Van Epps Gilmer, Jr.'s request for production of documents

05-17-04 Filed: Defendant Megadyne's Motion for Protective Order

05-17-04 Filed: Defendant Megadyne's Memorandum in Support of Motion for Protective Order

06-04-04 Filed: Plaintiffs' Memorandum in Opposition to Defendant Megadyne's Motion for a Protective Order

06-25-04 Minute Entry - MINUTE ENTRY RULING

Judge: L A DEVER

Clerk: rhondam

The Court has received several notice to submits. Since receiving these notices additional documents have been filed. The rule requires that all briefing be complete before a request to submit is filed. The Court directs the parties to file new requests that identify all pleadings to be considered by the Court on each notice. If courtesy copies have not been filed, they are to be attached to the new notice.

Judge L A DEVER

07-08-04 Filed: Reply memorandum in support of motion for protective order

07-12-04 Filed: Notice to Submit pending Motions for Decision and to set Motions for Hearing

08-16-04 Notice - NOTICE for Case 980907641 ID 6029787

ORAL ARGUMENTS is scheduled.

Date: 09/30/2004

Time: 02:00 p.m.

Location: Third Floor - S35

Third District Court

450 South State

SLC, UT 84114-1860

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CASE NUMBER 980907641 Contracts

Before Judge: L A DEVER

Oral Arguments on Defendant's Motion for Partial Summary Judgment, Plaintiffs' Motion to Strike Portions of Affidavit (2), and Defendant Megadyne's Motion for Protective Order.

08-16-04 ORAL ARGUMENTS scheduled on September 30, 2004 at 02:00 PM in Third Floor - S35 with Judge DEVER.

09-07-04 Filed return: Subpoena Duces Tecum on Return-United Parcel Service Inc.

Party Served: Chad Toleafoa authorized agent

Service Type: Personal

Service Date: September 02, 2004

09-07-04 Filed return: Subpoena Duces Tecum on Return-USF Reddaway, Inc.

Party Served: Chad Toleafoa authorized agent

Service Type: Personal

Service Date: September 02, 2004

09-10-04 Filed: Rule56(f) Affidavit of Dale F. Gardiner

09-10-04 Filed: Supplemental Affidavit of Kenneth L. Failor in Opposition to Megadyne's Motion for Partial Summary Judgment

09-17-04 Filed: Affidavit of Derk G. Rasmussen, CPA, ABV, ASA, CFE

09-24-04 Filed: Motion to Strike

09-24-04 Filed: Memorandum in support of Motion to Strike

09-24-04 Filed: Affidavit of Rodney R. Parker
 09-30-04 Minute Entry - Minutes for ORAL ARGUMENTS
 Judge: L A DEVER
 Clerk: rhondam
 PRESENT

Plaintiff's Attorney(s): DALE F GARDINER
 JENNIE B GARNER
 Defendant's Attorney(s): HAROLD G. CHRISTENSEN
 RODNEY R. PARKER

Video
 Tape Number: Disk 005 Tape Count: 2:05-3:01

HEARING

This case is before the Court for Oral Arguments on 4 pending motions. Plaintiff's request the Court to enforce defendant's to provide sufficient discovery in this matter. Before pending motions can be decided.

Counsel argues motions and requests for discovery.

COUNT: 2:49

Court is in recess.

COUNT: 2:53

Court is back in session. Court Orders defendant's to Supply Invoice Reports; first on how many blades came in the door and how

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many coated blades went out the door. Year 2000: Jan., April, Aug., Oct. Year 2001: Feb., June, Aug., Nov., Year 2002: Feb., June, Aug., Nov., Year 2003: Jan., April, Aug., Oct. Plaintiff's may have 20 invoices of each month to choose from. Upon receipt of invoices counsel has 60 days to submit briefing. Counsel may submit supplemental memo's.

Attorney Rod Parker to prepare the order.

10-01-04 Fee Account created Total Due: 10.00
 10-01-04 AUDIO TAPE COPY Payment Received: 10.00
 10-12-04 Filed: Plaintiffs' Memorandum in Opposition to Defendant's Motion to Strike
 10-12-04 Filed: Affidavit of Jennie B. Garner
 10-22-04 Filed: Plaintiffs' Objection to Proposed Order Regarding Hearing of September 30, 2004
 12-20-04 Minute Entry - MINUTE ENTRY RULING
 Judge: L A DEVER
 Clerk: rhondam

A critical factor in determining the accuracy of the amount of coated blades is knowledge of the total amount of blades purchased by defendant. Even though the monthly totals may not coincide, those differences would eventually even out. The defendant's order is to include the number of blades purchased for each year.

Judge L A DEVER

09-19-05 Filed order: Order Regarding Hrg of 9-30-04

Judge L A DEVER

Signed September 19, 2005

10-04-05 Fee Account created Total Due: 2.25
 10-04-05 COPY FEE Payment Received: 2.25
 05-02-06 Notice - NOTICE for Case 980907641 ID 6612593
 ORDER TO SHOW CAUSE is scheduled.

Date: 08/04/2006

Time: 10:00 a.m.

Location: Third Floor - S35
 Third District Court
 450 South State
 SLC, UT 84114-1860

Before Judge: L A DEVER

On its own motion, the Court orders the parties to appear on said date and time and show cause why this case should not be dismissed for failure to prosecute. By failing to appear, the Court will enter an order of dismissal without further notice.

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CASES ON THE ORDER TO SHOW CAUSE CALENDAR WILL NOT BE CONTINUED. DO NOT CALL THE COURT. TO AVOID APPEARANCE OR DISMISSAL, you may submit a certificate of readiness for trial in writing 10 days prior to hearing.

05-02-06 ORDER TO SHOW CAUSE scheduled on August 04, 2006 at 10:00 AM in Third Floor - S35 with Judge DEVER.

07-21-06 Filed: Motion to Substitute Parties

07-21-06 Filed: Memorandum in support of Motion to Substitute Parties

07-31-06 Filed: Second Supplemental Affidavit of Kenneth L. Failor in Opposition to Megadyne's Motion for Partial Summary Judgment

07-31-06 Filed: Plaintiff's Supplemental Memorandum in Opposition to Megadyne's Motion for Partial Summary Judgment

08-01-06 Filed: Plaintiffs Response to the Court's Order to Show Cause and Status Report

08-04-06 Fee Account created Total Due: 0.50

08-04-06 COPY FEE Payment Received: 0.50

08-04-06 Minute Entry - Minutes for Order to Show Cause

Judge: L A DEVER

Clerk: rhondam

PRESENT

Plaintiff's Attorney(s): DALE F GARDINER

Defendant's Attorney(s): HAROLD G CHRISTENSEN

Audio

Tape Number: disk 095 Tape Count: 10:22-10:26

HEARING

TAPE: disk 095 COUNT: 10:22-10:26

This case is before the Court for an Order to Show Cause. Counsel informs the Court there are pending motions. Court gives defendant's counsel 90 days to respond to plaintiff's recent motion.

Court gives plaintiff's counsel 20 days to reply to defendant's response. Court gives 60 days for counsel to submit and identify all the outstanding motions pending before the Court. Once time has run counsel to submit for decision for arguments.

08-04-06 Filed: Notice of Appearance of Co-Counsel-Ricky S. Torrey

01-17-07 Filed: Defendant's Response to Plaintiff's Supplemental Memorandum in Opposition to Megadyne's Motion for Partial Summary Judgment

01-17-07 Filed: Appendix to Defendant's Response to Plaintiffs' Supplemental Memorandum in Opposition to Megadyne's Motion for Partial Summary Judgment

01-17-07 Filed: Affidavit of Jeffrey B. Roberts

01-23-07 Filed: Affidavit of Ronda K. Magnuson

01-24-07 Filed: Affidavit fo Robert J. Farnsworth

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03-05-07 Fee Account created Total Due: 29.25

03-05-07 COPY FEE Payment Received: 29.25

04-13-07 Filed: Plfs' Second Supplemental Memorandum in Opposition to Megadyne's Motion for Partial Summary Judgment

04-24-07 Filed: Plaintiffs' Request to Submit Pending Motions for Decision and to Set Motions for Hearing

06-12-07 Note: 6/11/07 - Contacted Pl. and Def. counsel to forward to Court by fax a list of pending motions. Pl. counsel to deliver no later than 6/12, Def. counsel to fax.

06-12-07 Note: **Case to be set for Hearing on all pending Motions**

06-12-07 Notice - NOTICE for Case 980907641 ID 11133442

MOTIONS HEARING is scheduled.

Date: 08/20/2007

Time: 10:00 a.m.

Location: Third Floor - S35

Third District Court

450 South State

SLC, UT 84114-1860

Before Judge: L A DEVER

Court will hear all pending Motions, which Atty's were asked to provide the Court with.

06-12-07 MOTIONS HEARING scheduled on August 20, 2007 at 10:00 AM in Third Floor - S35 with Judge DEVER.

06-18-07 Filed: Notice of Change of Law Firm and Address

07-11-07 Filed: Corrected Affidavit of R. Paul Beard, CPA
 08-10-07 Fee Account created Total Due: 6.50
 08-10-07 COPY FEE Payment Received: 6.50
 08-20-07 Minute Entry - Minutes for ARGUMENTS/PENDING MOTIONS
 Judge: L A DEVER
 Clerk: rhondam
 PRESENT

Plaintiff's Attorney(s): DALE F GARDINER
 RICKY S TORREY

Defendant's Attorney(s): RODNEY R PARKER

Audio

Tape Number: Cd 149 Tape Count: 10:01-11:07

HEARING

This case is before the Court for arguments on pending motions.
 Motion for Summary Judgment and Motions to Strike. Counsel argue
 the motions.

After review of arguments the Court denies Defendant's Motion for
 partial summary judgment and therefore protective order is moot.
 Trial dates are denied at this time based upon discovery issues

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still pending.

Additional pending motions to be noticed up and heard.

08-24-07 Filed: CD Request (copied 8/28/07)

08-24-07 Fee Account created Total Due: 10.00

08-24-07 AUDIO TAPE COPY Payment Received: 10.00

09-05-07 Filed: Notice of Change of Address (Dale Gardiner)

09-28-07 Filed order: Order from Hearing on August 20,2007

Judge L A DEVER

Signed September 28, 2007

10-01-07 Filed: Notice of Substitution of Counsel-George M. Haley

10-09-07 Filed: Rule 26(f) Attys' Planning Meeting Report

10-30-07 Fee Account created Total Due: 11.25

10-30-07 Fee Account created Total Due: 18.25

10-30-07 SPECIAL SEARCHES Payment Received: 11.25

10-30-07 COPY FEE Payment Received: 18.25

10-31-07 Filed: Plaintiff's Supplemental Memorandum in Opposition to
 Defendant's Motion to Strike the Jury Demand and for Judgment on
 the Master's Report

10-31-07 Filed: Plaintiffs' Supplemental Memorandum Re: Plaintiffs'
 Motion for an Evidentiary Hering on the Master's Report

10-31-07 Filed: Plaintiff's Supplemental Memorandum Re: Plaintiffs'
 Objections to the Master's Report

10-31-07 Filed: Supplemental Memorandum of Megadyne Medical Products,
 Inc. Regarding: 1- Megadyne's Motion to strike jury demand and
 to enter judgment on the Master's Report (filed 8-30-2000); 2-
 Plaintiff's Objections to the Master's Report

10-31-07 Filed: filed 8-10-2000); 3- Plaintiff's renewed Motion to Depose the Master (filed 10-17-2001); and 4- Plaintiff's renewed motion for and evidentiary hearing on the Master's Report (filed 10-17-2001).

10-31-07 Filed: Plaintiffs' supplemental memorandum re: Plaintiffs' renewed motion to depose the master

12-04-07 Filed: Certificate of Service (Pltfs. Initial Disclosures pursuant to Rule 26(a)(1) of the Utah Rules of Civil Procedure

12-04-07 Filed: Certificate of Service

12-05-07 Filed: Motion for Leave to File an Amended Consolidated Complaint
Filed by: GARDINER, DALE F

12-05-07 Filed: Memorandum in Support of Plaintiffs' Motion for Leave to File an Amended Consolidated Complaint

12-24-07 Filed: Memorandum in Opposition to Motion for Leave to File an Amended Consolidated Complaint

12-26-07 Filed: Certificate of Service

01-07-08 Filed: Plaintiffs' Reply Memorandum in Support of Motion for Leave to File an Amended Consolidated Complaint

01-14-08 Filed: Joint Request to Submit for Decision and for Oral Argument the Following Pending Motions: 1. Megadyne's Motion to Strike Jury Demand 2. Plaintiffs' Obj. to the Final Report 3. Plaintiff's renewed Motion to depose 4. Plaintiff's Motion

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for

01-29-08 Notice - NOTICE for Case 980907641 ID 11355108

ARGUMENTS/PENDING MOTIONS is scheduled.

Date: 03/05/2008

Time: 09:00 a.m.

Location: Third Floor - S35

Third District Court

450 South State

SLC, UT 84114-1860

Before Judge: L A DEVER

01-29-08 ARGUMENTS/PENDING MOTIONS scheduled on March 05, 2008 at 09:00 AM in Third Floor - S35 with Judge DEVER.

02-07-08 Notice - NOTICE for Case 980907641 ID 11363690

ARGUMENTS/PENDING MOTIONS.

Date: 03/06/2008

Time: 02:00 p.m.

Location: Third Floor - S35

Third District Court

450 South State

SLC, UT 84114-1860

Before Judge: L A DEVER

The reason for the change is Stipulation of counsel

02-07-08 ARGUMENTS/PENDING MOTIONS scheduled on March 06, 2008 at 02:00 PM in Third Floor - S35 with Judge DEVER.

02-15-08 Filed: Certificate of Service

02-20-08 Filed: Amended Notice of Arguments/Pending Motions on Return-John Curran (forwarded to forwarding address

03-03-08 Filed: Amended Notice of Arguments/Pending Motion on
Return-John Curran unable to forward

03-06-08 Minute Entry - Minutes for ARGUMENTS/PENDING MOTIONS

Judge: L A DEVER

Clerk: rhondam

PRESENT

Plaintiff's Attorney(s): DALE F GARDINER

Defendant's Attorney(s): GEORGE M HALEY

J ANDREW SJOBLUM

Audio

Tape Number: Cd 176 Tape Count: 1:59-3:19

HEARING

This case is before the Court for arguments on pending motions.
Motions argued in this case are 1. Megadynes Motion to Strike Jury
demand. 2. Plaintiff's objection the the final report 3.
Plaintiff's renewed Motion to Depose the Master.

Counsel argues the motions. After review of arguments in this

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case the Court the Court takes this matter under advisement and
will render a written decision.

05-06-08 Filed order: ORDER (See Written Order in File)

Judge L A DEVER

Signed May 06, 2008

05-28-08 Filed: Supreme Court of Utah - Letter to Counsel - The petition
for Interlocutory Appeal was filed. The case number is 20080459
and should be indicated on any future filings. - 20080459-SC

06-19-08 Filed: Supreme Court of Utah-Order-Matter Will Transfer to Utah
Court of Appeals

06-19-08 Filed: Utah Court of Appeals-Letter-Case has been assigned-Case
Number remains with the exception of -CA as the suffix

06-27-08 Filed: Utah Court of Appeals - Letter to Dale F. Gardiner -
Enclosed is a copy of the order granting the Interlocutory
Appeal. This order takes the place of a notice of appeal...
(see file) - 20080459-CA

06-27-08 Filed: Utah Court of Appeals - Order - The petition for
permission to appeal is granted. - 20080459-CA

07-28-08 Filed: Request for Transcript of Hearing on March 6,
2008-2008-0459-CA

08-06-08 Note: Cert/Copy of Request for Transcript forwarded to Utah
Court of Appeals-20080459-CA

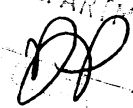
08-06-08 Filed: Transcript of Motion hearing dated 3-6-08, Carolyn
Erickson, CCT

08-06-08 Filed: Notice of Filing Transcript of Motion hearing dated
3-6-08, Carolyn Erickson, CCT

09-17-08 Note: Cert/Copy of Record Index forwarded to Utah Court of
Appeals-20080459-CA

10-09-08 Note: Record check out F-18 T-6, to Cassie Medura, attorney,
237-0250
12-03-08 Note: Record returned by Cassie Medura- Files - 17, transcripts
- 7, 20080459
12-03-08 Note: Appealed: Case #20080459
12-03-08 Filed: Letter from Mr. Petersen (Vancott) regarding return of
files.
01-12-09 Note: Andrew Sjoblom, ATD, (323-3200 Deb Bowman) checked out
record, Files-17, Transcript -6, 20080459 CA

Tab 4

FILED
THIRD DISTRICT COURT
CO. REC-3 PM 12:35
SALT LAKE DEPARTMENT
BY 

John W. Curran
Ernst & Young LLP
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Special Master

**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

KENNETH L. FAILOR; and
PREMIUM PLASTICS, INC. a
California Corporation;
HARVEY VAN EPPS GILMER, JR.

Plaintiffs,

v.

MEGADYNE MEDICAL PRODUCTS, INC.,
a Utah Corporation, f.k.a.
American Medical Products, Inc.

Defendants.

FINAL REPORT OF SPECIAL MASTER

Civil No. 980907641

Judge Leon A. Dever

KENNETH L. FAILOR;
AND PREMIUM PLASTICS, INC.
A CALIFORNIA CORPORATION;
HARVEY VAN EPPS GILMER, JR.,
PLAINTIFFS

v.

MEGADYNE MEDICAL PRODUCTS, INC.
A UTAH CORPORATION;
F.K.A. AMERICAN MEDICAL PRODUCTS, INC.
DEFENDANT

FINAL REPORT OF SPECIAL MASTER
August 3, 2000

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EXHIBIT ATTACHMENTS

Report of Special Master

REPORT OF SPECIAL MASTER

Honorable Leon A. Dever
In the Third Judicial District Court
In and for Salt Lake County, State of Utah

Kenneth L. Failor;
and Premium Plastics, Inc.
a California Corporation;
Harvey Van Epps Gilmer, Jr.,
Plaintiffs

v.

MegaDyne Medical Products, Inc.
a Utah Corporation;
f.k.a. American Medical Products, Inc.
Defendant

Civil No. 980907641

Introduction

Order of Reference and Agreements Under Review

Pursuant to Rule 53, Utah R. Civ. P., Plaintiffs and Defendant consented to an Order of Reference dated February 11, 1999 appointing John W. Curran of Ernst & Young LLP to serve as Special Master in the above named action until further Order of the Court.

The Special Master submitted an affidavit of impartiality dated February 9, 1999.

The referred issues included in the Order of Reference relate to the amount of the Defendant's products coated and the Defendant's coated products sold under the agreements between the Plaintiffs and Defendant.

The Order of Reference, Section Four – Duties, provides the following:

The Special Master shall take evidence on, identify, and prepare a report to the Court of his findings as to, the amount of Defendant's products coated and the amount of Defendant's coated products sold under the Agreements.

The specific agreements relating to this Order of Reference are:

Description of Agreement	Parties to Agreement	Date
Compensation Agreement	American Medical Products, Inc. and Kenneth L. Failor KF Manufacturing, Inc.	Dated April 20, 1988 and signed April 22, 1988. Addendum dated and signed April 21, 1988
Exclusive Product Coating Agreement	American Medical Products, Inc. and Premium Plastics, Inc.	Entered into June 1, 1988
Agreement	MegaDyne Medical Products, Inc. and Premium Plastics, Inc. and Harvey Van Epps Gilmer, Jr.	Entered into March 26, 1991
Contract Modification of March 26, 1991 contract	MegaDyne Medical Products, Inc. and Premium Plastics, Inc.	Undated (refers March 26, 1991)
Contract Modification of March 26, 1991 contract	MegaDyne Medical Products, Inc. and Premium Plastics, Inc.; and Harvey Van Epps Gilmer, Jr.	September 15, 1997

Time Periods Under Review of Special Master

Agreement period from March 1, 1996 to September 15, 1997.

Agreement modification period from September 15, 1997 to March 31, 1999.

History and Summary of Agreements

The matter before the Special Master is a dispute between the parties as to the amounts due based on the respective agreements relating to nonstick surface coatings applied to medical surgical products. Mr. Failor was involved with assisting Dr. G. Marsden Blanch in the initial development of a process to coat electro-medical/surgical devices with PTFE nonstick covering. The coating process was assigned to American Medical Products, Inc. prior to 1988.

The parties to the dispute entered into various agreements regarding the process and payment of royalties and other payments during the period of 1988 through 1997.

The subject matter of the agreements is a Process Technology that the Defendant MegaDyne Medical Products, Inc. f.k.a. American Medical Products, Inc., conceived and developed using a polytetrafluoroethylene (PTFE) compound application as a nonstick surface (coating) to certain electro-surgical instruments used in performing certain surgical procedures.

Premium Plastics, Inc. (PPI) (Plaintiff) consulted with Defendant (MegaDyne) and was capable of coating medical products in commercial quantities. The Defendant engaged PPI to be the exclusive product coater on behalf of the Plaintiffs, as of June 1, 1988. Following is a history and summary of pertinent portions of the various agreements:

Mr. Failor Compensation Agreement April 20, 1988

This agreement is between American Medical Products, Inc. (AMP) and Mr. Kenneth L. Failor (Failor), individually and KF Manufacturing (KFM). This agreement superseded an agreement dated May 12, 1987 between the same parties. The agreement provided for AMP to compensate Failor and/or KFM for only certain products of AMP commonly known as the following:

- E/Z Clean Cautery Tip
- E/Z Clean Needle Tip
- E/Z Clean Extended Blade Tip
- E/Z Clean Ball Electrode

The term of the agreement shall be from the date of execution (April 20, 1988) for a term of nine years. The nine-year term ended April 19, 1997.

AMP agreed to compensate Failor/KFM for each unit of the specifically named products of AMP that were actually sold to and collected from customers of AMP during the nine-year term, based on the following per unit and per year compensation schedule.

Agreement Year	Time Period	Compensation Per Unit
Year 1 – 3	April 20, 1988 to April 19, 1991	\$.08
Year 4	April 20, 1991 to April 19, 1992	.07
Year 5	April 20, 1992 to April 19, 1993	.06
Year 6 – 9	April 20, 1993 to April 19, 1997	.05

The compensation payment will be paid on a monthly basis if and when AMP receives payment from AMP customers. An addendum to the compensation agreement was dated April 21, 1988. The provisions of the addendum are as follows:

AMP and Premium Plastics Inc. (PPI) entered into an agreement dated June 1, 1988 summarized below. That agreement provided for PPI to coat products for AMP. Pursuant to that June 1, 1988 agreement PPI is to be required to provide Failor with invoice copies detailing AMP's purchase of coated products from PPI.

Premium Plastics Inc.

Exclusive Product Coating Agreements – June 1, 1998

This agreement was between AMP and PPI.

The agreement states that AMP has conceived and developed the concept of applying a nonstick surface (coating) to certain electro-surgical instruments used in performing certain surgical procedures (the Process Technology).

AMP engaged and employed PPI as the exclusive product coater of the AMP products by using the Process Technology developed by AMP.

PPI was the only person (entity) authorized by AMP to apply the coating to AMP products. PPI shall not apply the coating or use the Process Technology on electro-surgical cautery instruments. However, PPI was allowed to apply coating to nonelectro-surgical cautery instruments.

The initial term of the agreement, unless terminated earlier shall be from June 1, 1988 for a period of ten years (June 1, 1988 to May 31, 1998).

The agreement shall be deemed renewed for an additional ten years unless notice is given. (See following subsequent agreement dated March 26, 1991.) Compensation from AMP to PPI for coating ranged from \$.25 to \$.75 per tip.

Agreement – Dated March 26, 1991 (Modification of June 1, 1988 Exclusive Agreement)

This agreement was between MegaDyne (f.k.a. American Medical Products, Inc.) and PPI and Harvey Van Epps Gilmer, Jr. (Gilmer),

This agreement modified the exclusive agreement dated June 1, 1988 because Mr. Gilmer desired to sell PPI. If PPI were sold, the sale would be a condition precedent to the modification of the June 1, 1988 exclusive agreement.

The term of the condition precedent was for a period of three years and would terminate at the end of the three years if a sale was not executed. (The three year period ended March 25, 1994 and PPI was not sold by Gilmer as of that date).

MegaDyne desired to assemble a plant, equipment, knowledge, and technology so that MegaDyne would be able to apply the coating itself.

The June 1, 1988 exclusive agreement was restated and modified as follows:

If the condition precedent occurs, then PPI shall no longer have an exclusive agreement to coat the MegaDyne Products.

MegaDyne shall have the first right to apply the coating through use of its own facilities and employees.

All obligations imposed under the June 1, 1988 exclusive agreement shall continue to be imposed.

Mr. Gilmer, at the request of MegaDyne, shall consult with MegaDyne to assist in setting up the coating process by MegaDyne.

Mr. Gilmer will be compensated on an hourly fee basis, plus expenses.

As additional compensation for consulting, Mr. Gilmer shall receive payment of \$.06 per unit coated for all MegaDyne Products coated.

The term of payment of the additional \$.06 compensation shall begin upon the conditional precedent happening, or its termination under certain conditions.

The additional \$.06 compensation shall continue for a ten-year period if Mr. Gilmer is unable to perform duties, or if he dies. If he dies

compensation will be paid to his estate or heirs up to the end of ten years after his death.

If any payment of additional compensation at \$.06 is paid while PPI is coating products for MegaDyne, the \$.06 shall be deducted from the other payments.

Contract Modification (Undated – Refers to March 26, 1991 Agreement)

This agreement was between MegaDyne and PPI and Gilmer.

This modification **provided** that MegaDyne will have present and future suppliers of metal cautery tips and laparoscopic devices provide a copy of all invoices to Harvey V. E. Gilmer, Jr.

Contract Modification – Dated September 15, 1997

This contract modification was between MegaDyne and PPI and Gilmer. This modification of the June 1, 1988 exclusive agreement between MegaDyne and PPI and Gilmer provided that payment of the \$.06 shall be based upon electrodes sold rather than upon electrodes coated for the period starting after September 30, 1997.

Beginning October 1, 1997 and continuing through December 1, 2005, MegaDyne shall pay \$.06 each month to PPI for each coated electrode invoiced or shipped to a third party for use or resale, including samples and consignments. Returns and bad debts will not be deducted against payments due PPI.

MegaDyne shall provide a computer printout reporting all electrodes invoiced and/or shipped during each month. Payment is due a month and ten days after end of said month.

MegaDyne will take an inventory of coated **finished** product as of September 30, 1997 and subtract the inventory from the sales in the period after October 1, 1997 because payment had already been paid to PPI prior to October 1, 1997, as payments were made based on coated electrodes.

Findings

The findings of the Special Master are segregated by each specific plaintiff because of the separate agreements between the plaintiffs and defendant and the specific time periods to be reviewed for each plaintiff.

Kenneth L. Failor (KF Manufacturing)

Agreement

Compensation agreement dated April 20, 1988 between AMP and Failor, individually, and KF Manufacturing.

The term of the agreement was from April 20, 1988 for a nine-year period ending April 20, 1997. The agreement listed four products that were the subject of compensation from AMP to Failor.

The agreement provided for various rates of compensation per unit. The compensation during the period under review by the special master was \$.05 per unit.

The agreement provided the \$.05 compensation to be paid monthly based on the actual units sold to customers of AMP (MegaDyne). Payment of the compensation will be made if and when AMP receives payment from AMP customers.

Mr. Failor Assertion of Position on Basis of Payment of Compensation

Mr. Failor has asserted a position that compensation payments under the agreement for the period March 1, 1996 through April 20, 1997 should be based on units coated during the period. The stated basis for the position is that payments to Mr. Failor from MegaDyne or its predecessors were computed and paid based on units coated and therefore a precedent was set. This position was asserted in Mr. Failor's statements under oath on April 14, 2000, on page 8, lines 1 to 5, and pages 13 through 16, and page 36.

Mr. Failor did not supply the Special Master with a written document, amendments or addendum to the April 20, 1988 agreement. Mr. Failor did not cite any specific oral agreement or understanding between himself and MegaDyne other than his statements under oath regarding his understanding and the precedent of payments being made to him based on coatings.

MegaDyne employees' statements under oath **did** not disclose any written amendments or addendums, nor any recollection of any oral agreement that would revise or supersede the written agreement.

Review of Documents

The Special Master's review of documents indicated the following related transactions between Failor and MegaDyne during the period from March 1, 1996 through and including April 20, 1997.

Based on the April 20, 1988 compensation agreement, Failor was to be paid on a monthly basis for units actually sold, if and when AMP (MegaDyne) received payment for the products from its customers.

Therefore, the payments to Failor per the agreement were intended to be net of any returns and net of any uncollectable sales.

The agreement **did** not provide for any payment for any samples or other coated units not paid for by customers.

Also, since the agreement **provided** for payment to Failor only when customers paid for salable units, the payment would not contemplate or provide payment of coated units on a produced basis nor would the agreement provide payment for any units rejected in the coating application process.

For the period March 1, 1996 **through** April 20, 1997 the actual payments from MegaDyne to Failor were computed based on the number of steel tip instruments purchased from vendors and on coating reports that indicated the number of instruments subject to the compensation agreement that were coated.

The Special Master determined, from review of records, that from March 1996 through December 1996 payments as computed by MegaDyne to Failor were paid on the quantity of blades purchased from outside vendors, or in some months based on the quantity of blades thought to have been purchased from vendors. The payments were not based on either the quantity of units coated or sold, but on purchases from vendors.

The Special Master determined from review of records that from January 1, 1997 through April 30, 1997 Mr. Failor's compensation was computed based on units coated as computed by MegaDyne. Mr. Failor was paid for units coated for the full month of April 1997 which included the period of April 21, 1997 through April 30, 1997 which was a period after the ending date of the agreement.

*Special Master's Computations of Compensation Due Mr. Failor During the Period
March 1, 1996 through April 20, 1997*

The written agreement dated April 20, 1988 states compensation to be based on sales collected from customers. However, Mr. Failor asserts a position that the compensation should be based on coated units because of a precedent being set.

The parties to this proceeding have not indicated an agreement as to the interpretation of the written agreement or any oral amendments that would provide guidance to the Special Master as to the basis for computing compensation to Mr. Failor as either based on net sales collected or units coated.

The Special Master is not in a position to resolve this legal issue as to the appropriate method. Because there is an unresolved dispute between the parties on the issue of the net sales or units coated basis, the Special Master will compute the compensation based on both the sales and units coated basis.

The parties will then need to resolve the issue as to the appropriate method between themselves.

*Special Master's Computation of Compensation for the Failor/MegaDyne Agreement
Dated April 20, 1988*

The Special Master provides below computations of compensation, both on a units sold and a units coated basis. Details for each month are included in Exhibit 5.

Computation Summary – Mr. Failor

Units Sold Basis in Accordance with the Written Agreement Dated April 20, 1988:

For the Period March 1, 1996 through April 20, 1997				
Coated Product Units Sold	Payment Due Per Unit	Computed Amount Due Based on Sales	Actual Amounts Paid For Months March 1996 through April 1997	Excess of Amounts Paid by MegaDyne as Compared to Amounts Due to Mr. Failor Based on Actual Sales
3,974,777	\$.05	\$198,738.85	\$265,264.45	\$66,525.60

Report of Special Master

Units Coated Basis Based on Mr. Failor's Position that a Precedent was Set so Compensation should be Based on Units Coated.

This is the computed amount due to Failor based on net coatings during the period of March 1, 1996 through April 20, 1997. This method is not in compliance with the written compensation agreement dated April 20, 1988. This computation is presented for the purpose of quantifying Mr. Failor's position based on coated units.

For the Period March 1, 1996 through April 20, 1997				
Net Coatings During Period March 1, 1996 through April 20, 1997	Payment Due Unit	Computed Amount Due Based on Net Coatings	Amounts Paid for Months March , 1996 through April 20, 1997	Excess of Amounts Paid by MegaDyne as Compared to Amounts Due to Mr. Failor Based on Actual Coatings
4,747,425	\$.05	\$237,371.25	\$265,264.45	\$27,893.20

Conclusion

The above computations indicate that Mr. Failor was paid a range of amounts in excess of the amounts due based on the compensation agreement dated April 20, 1988 summarized as follows:

For Period March 1, 1996 through April 20, 1997	Units	Computed Compensation at \$.05 per Unit	Actual Amounts Paid	Overpayment by MegaDyne to Mr. Failor
Written agreement basis:				
Units sold	3,974,777	\$198,738.85	\$265,264.45	\$66,525.60
Mr. Failor precedent basis:				
Units coated	4,747,425	\$237,371.25	\$265,264.45	\$27,893.20

Mr. Failor Statement on Precedent Setting and no Payment Reported from MegaDyne to Mr. Failor in the Month of March 1996.

Mr. Failor testified that he was compensated by MegaDyne based on units coated. The compensation agreement provided for payments to Mr. Failor based on net sales.

The Special Master was not able to find any evidence that Megadyne made a payment to Mr. Failor for the month of March 1996.

If Mr. Failor was compensated prior to March 1, 1996 based on units coated rather than on a sales basis of compensation some of the units sold after March 1, 1996 would have already been included in the compensation paid to Mr. Failor on a units coated basis.

Premium Plastics, Inc. and Harvey Van Epps Gilmer, Jr.

Agreements

An exclusive product coating agreement was entered into on June 1, 1988 between AMP (MegaDyne) and Premium Plastics, Inc. There are three modifications to the base agreement.

Mr. Gilmer was added as a party to the modification agreement, dated March 26, 1991.

The base agreement provided for compensation to PPI for the actual application of PTFE coating to the electro-surgical instruments at various rates, depending on the product coated.

The first modification was an agreement dated March 26, 1991 between the parties, providing Gilmer additional compensation for consulting. The rate of compensation was indicated as \$.06 per unit for all MegaDyne products coated with PTFE by MegaDyne or its designee(s). The period of the payment was to begin upon the happening of the condition precedent (sale of business) or its termination, which was three years from the date of the agreement or March 26, 1994.

The payment was indicated as being due for MegaDyne coated products as well as any coated by PPI. However, PPI shall reduce its charge for coating of any MegaDyne coated products by an amount equal to the per unit coated fee of \$.06 per unit that is paid to Gilmer.

The second modification was undated and provided that MegaDyne provide Mr. Harvey Van Epps Gilmer, Jr. a copy of all invoices of present and future suppliers of metal tips.

The third contract modification dated September 15, 1997 provided for a change in the method of computing the payment due Gilmer of \$.06 per unit.

Prior to this modification, the payment was to have been based on the amount of electrodes coated. The modification provided that beginning October 1, 1997 MegaDyne shall pay PPI each month \$.06 for each electrode invoiced or shipped to a third party for use or resale, including samples and consignments with lot numbers dated on or after September 1, 1997.

The September 15, 1997 modification provided that returns and bad debts will not be debited against payments due PPI. MegaDyne will receive a credit for any inventory of coated electrodes not billed in September 1997. These are electrodes that MegaDyne previously paid PPI based on the prior agreement to pay based on coated electrodes. A physical inventory shall be taken by MegaDyne of actual electrodes coated as of September 30, 1997.

Prior to February 1996, the coating process was applied by PPI. The Special Master did not examine the period prior to March 1, 1996. It is the Special Master's understanding that payments were made to PPI based on PPI's invoices to MegaDyne for coated units. The Special Master is not aware of any continuing specific dispute as to the amounts of payments made to PPI based on the coating application and the units reported and invoiced by PPI to MegaDyne prior to March 1, 1996.

The original exclusive product coating agreement dated June 1, 1988 provided compensation to PPI for the coating process but did not provide for consulting or royalty type compensation.

The March 26, 1991 modification agreement provided for additional compensation to Gilmer of \$.06 per unit for all MegaDyne products coated by MegaDyne with PTFE by MegaDyne or its designees for a ten-year period.

The September 15, 1997 contract modification provided for payment based on electrodes invoiced or shipped to a third party until December 1, 2005. The examination of the coatings, sales, and payments by MegaDyne to PPI for the period under examination by the Special Master included a 37-month period from March 1, 1996 through March 31, 1999.

The compensation amounts due and paid to Premium Plastics are summarized below. The amounts due and paid are segregated into the period during which amounts due were to be computed based on coatings and the period during which payments were to be computed based on sales. A detailed schedule of each month is attached as Exhibit 5.

Computations Based on Coatings Periods March 1, 1996 through September 30, 1997.

This period is segregated into two periods. The period March 1, 1996 through December 31, 1996 includes the period during which MegaDyne computed and paid the compensation based on the number of raw material uncoated instruments purchased from third party suppliers as explained previously. The period of January 1, 1997 through September 30, 1997 includes the period during which MegaDyne computed and paid the compensation based on the number of units coated by MegaDyne.

Report of Special Master

Computation Summary Premium Plastics, Inc.

Time Period	Actual Units Coated	Rate per Unit	Computed Compensation (Units Multiplied by Rate)	Actual Payments	Excess of Amounts Paid by MegaDyne Compared to Amounts Computed as Due to Premium Plastics, Inc.
Purchase basis period					
March 1, 1996 through December 31, 1996	2,956,566	\$.06	\$177,393.96	\$203,778.60	\$26,384.64
Coatings Basis Period					
January 1, 1997 through September 30, 1997	2,516,512	.06	150,990.72	152,746.62	1,755.90
Summary Periods					
March 1, 1996 through September 30, 1997	5,473,078	\$.06	\$328,384.68	\$356,525.22	\$28,140.54

October 1, 1997 through March 31, 1999 – Sales Basis.

This period includes the transitional period during which the method of payment changes from payment on coatings to payment based on sales.

	Computation of Amount Due Based on Sales Basis (Contract Modification September 15, 1997)	Actual Payments During Period	Underpayment by MegaDyne as Compared to Amounts Computed as Due to Premium Plastics, Inc.
Units sold during period – October 1, 1997 through March 31, 1999	5,267,126		
Less coated units included as inventory as of September 30, 1997 (Payment was paid for these coated units prior to September 30, 1997 during the period when payment was made on a coated unit basis)	(434,803)		
Net units for which payment is due	4,832,323	4,701,621	130,702
Amount per unit	\$.06	\$.06	\$.06
Dollar amounts	\$ 289,939.38	\$ 282,097.26	\$ 7,842.12

Summary of computed amounts due and actual payments for the period March 1, 1996 through March 31, 1999 is as follows:

	Units	Amount Due at \$.06 per Unit	Actual Payment	Difference Over (Under) Payment
Coated	5,473,078	\$328,384.68	\$356,525.22	\$28,140.54
Sold	4,832,323	289,939.38	282,097.26	(7,842.12)
Totals	10,305,401	\$618,324.06	\$638,622.48	\$20,298.42

Review of Documents and Evidence

The Special Master and Ernst & Young LLP employees reviewed the documents and evidence noted below:

Actual Payments of Compensation from MegaDyne to Mr. Failor and Premium Plastics Inc.

Schedules of payments made to the parties from MegaDyne were obtained. Check copies of payments were reviewed. Schedules of payments were independently confirmed by each party as to their accuracy and completeness. Variances noted by the parties were noted, reviewed and reconciled. Schedules of payments are attached as Exhibit 3. These confirmed and agreed payment schedules are the source and form the basis for the actual compensation payments. The schedules were also the subject of inquiry and testimony included in the statements under oath.

Products Subject to the Compensation Agreements

The compensation agreements were reviewed and the pertinent sections relating to coated product instruments were noted.

In order to determine the number of coated units shipped, the Special Master developed a product key of all products included on Megadyne invoices. This product key denotes the product code, description, and number of coated pieces per sales unit (i.e., box). The product key was then matched against the products shipped in the sales register to determine the total number of coated pieces subject to the compensation agreements shipped in the respective month.

Schedules of the product codes for coated products that were developed by MegaDyne were summarized and reviewed. The schedules were made available to each of the parties for their independent review. Each party prepared a listing of the products that in their opinion is to be included for compensation purposes for their respective agreements.

The listings of each party was compared to the MegaDyne listing of product items that in their opinion are subject to the respective agreements.

Differences between the parties were noted. The differences as to which products should or should not be included in the respective agreements will need to be determined between the parties. Refer to Exhibit 2 for the product key and differences between parties.

The difference between PPI and Megadyne was negligible. The difference between Failor and Megadyne is \$13,500 as detailed in Exhibit 6. If all of the products indicated by Mr. Failor were in fact subject to the royalty payments, the additional royalties would increase by \$13,500 to Mr. Failor. This would decrease the amount of over payments. Note that this difference is only for June 1, 1996 through April 20, 1997. Information from March 1, 1996 to May 31, 1996 is not available.

Purchases of Raw Material – Uncoated Instruments

The Defendant, MegaDyne, purchased raw material, consisting principally of uncoated steel tip blade instruments, from three vendors: National Wire, Bimco, and Ellingson. In order to verify the amount purchased and received by MegaDyne the Special Master:

1. Obtained copies of all invoices from MegaDyne and prepared schedules, compiled and reviewed invoices.
2. Obtained copies of all invoices from Mr. Failor and Premium Plastics, Inc.
3. Obtained written confirmation from external suppliers of steel tip blades and reconciled with invoices.
4. Agreed blades purchases to coating reports.

Refer to Exhibit 4 for schedule of purchases and confirmations from suppliers.

Computation of Units Coated

The Special Master computed the number of coated units utilizing the following documents:

Coating Reports

The Special Master determined that from March 1996 to December 1996, payments to Failor and PPI were not necessarily based on actual units coated. Rather, MegaDyne paid Failor and PPI based on the quantity of blades purchased, or in some cases, thought to have been purchased from suppliers. The Special Master determined the actual blades that were coated in this time frame by a review of MegaDyne coating operations documents and a recomputation of the number of units coated during the period of March 1996 through December 31, 1996.

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For each batch that was placed in the oven, MegaDyne manufacturing personnel prepared in the normal course of business a "Record of Coating Process Conditions" report that documented the date of processing, lot number, batch number, and catalog number, as well as certain quality control processing conditions. The quantity coated was not included in these reports during the period of March 1996 through December 1996 but was determined by tracing the lot number to the original invoice with the same lot number. The Special Master obtained copies of "Record of Coating Process Conditions" for all significant product numbers.

MegaDyne prepared a schedule, by significant catalog number, that indicated the quantity received and quantity coated. The Special Master verified quantity received to copies of invoices from National Wire noting lot number. The Special Master verified quantity coated by tracing lot number per quantity received to the "Record of Coating Process Conditions" report. No exceptions were noted. Normally, a given lot number will be processed in several batch numbers, as the quantities are restricted by oven capacity.

For the period of January 1997 through March 1999, coating reports by each product included quantities coated.

The Special Master prepared a schedule of coated units for each product for each month under review.

The Special Master traced the amounts that were coated to amounts that were paid upon to determine any over/underpayment.

Sterilization Documents

MegaDyne sub-contracted with Isomedix, a third-party vendor, to sterilize its coated blades. The Special Master determined that a significant percentage of MegaDyne's sales are in bulk and not sterilized under the control of MegaDyne or Isomedix. Therefore, an examination of sterilization reports did not provide any assurance of total units coated.

Sales of Coated Instruments Subject to the Respective Compensation Agreements

MegaDyne prepared an invoice for each sale of coated instruments to customers. The invoice included the name of the purchaser, date of purchase, description of product, product code number, quantity sold, price per unit and extended sales price. Each invoice included a unique invoice number. During the period from March 1996 through March 1999 many thousands of invoices were generated by MegaDyne.

Invoices were also generated for the quantity of samples or other non-revenue producing coated units distributed.

MegaDyne provided the sales invoices stored in numerous boxes and the electronic format of sales registers compiling the invoices sold for each month.

The Special Master obtained the monthly sales register from MegaDyne in an electronic format (i.e., downloaded from MegaDyne's accounting system) that contained the following information: invoice date, invoice number, item ordered, quantity, unit price, and extended price. To verify the integrity of the sales register data the Special Master:

1. Applied statistical sampling techniques testing and comparing the electronic data and actual hard copy of invoices determining within a 98% confidence level that the electronic data is the same as hard copy invoices.
2. Summed the monthly total dollar value of the electronic sales data and agreed this amount to the general ledger within an immaterial difference.
3. Agreed the annual total of monthly general ledger totals to the annually reviewed financial statements.
4. Agreed the reviewed financial statements to the Federal income tax returns for the years under review.
5. Performed analytical review procedures.

Based on the testing and analytical procedures performed and results obtained, the Special Master is confident that each coated electrode that has been shipped has been included by MegaDyne's accounting system and the data obtained by the Special Master therefore represents shipping and sales activity recorded by MegaDyne from June 1996 to March 1999.

For the period of March 1996 through May 1996 the electronic format of sales was not available. For this period sales were determined by product code from inventory activity reports. These reports were agreed to supporting documentation including general ledger and financial statements.

Sales of Coated Electrodes

The sales of coated electrodes that are subject to the agreements accounted for approximately 97% of all sales recorded by Megadyne as indicated in Exhibit 6.

Modification of Premium Plastics Inc./MegaDyne Agreement from Payment on a Basis of Units Coated to Units Sold as of September 30, 1997

The Modification Agreement dated September 15, 1997 stated, "MegaDyne shall take a physical inventory to determine the actual number of electrodes coated as of September 30, 1997 to insure that Premium is paid for all electrodes coated as of said date." The ending inventory shall be deducted from future coated electrodes sold.

MegaDyne prepared a document listing coated instruments by product code, lot number, and quantity. The MegaDyne document was signed by a MegaDyne employee and was dated September 30, 1997. The total number of units included on this listing was 434,803.

The modification agreement indicated that the amount of coated inventory at September 30, 1997 would be subtracted from future sales.

MegaDyne determined that 448,978 units were sold in October and November 1997 and MegaDyne subtracted the coated inventory of 434,803 from the 448,978. The product of this subtraction was 14,175 units. MegaDyne computed at the rate of \$.06 per unit a payment due to Premium of \$850.50.

However, the Special Master's review indicated that the actual sales for October and November 1997 totaled 562,833 units, a subtraction of the coated inventory of 434,803 resulted in the number of units on which compensation was to be paid as 128,030. The compensation at \$.06 was computed to be \$7,681.80 as compared to \$850.50, which is an underpayment by MegaDyne to Premium of \$6,831.30 during the month of November 1997.

Unused or Voided Sales Invoice Numbers

In addition to testing the number of each coated instrument invoiced and the sales dollars, the Special Master developed an additional program calculation that searches for invoice number gaps and lists the total number of missing invoices in this time frame. During our review of the invoice gaps, we noted that there are large gaps near the beginning or end of months due to an out of sequence number in that particular month (i.e., shipped in a different period compared to those in the same sequence). However, when invoices are analyzed in total over the entire period, there were a total of 296 missing invoices out of a total of 29,000. The largest single gap was 7. Additionally, there was a gap of 912 invoices when MegaDyne switched to its new accounting system (it started with the next whole thousand invoice sequence of 49,000 in November 1997). The small gaps are attributable to invoices being dropped from the system due to the cancellation of the

Report of Special Master

order. For example, when a customer calls for an order, an invoice is “opened” by customer services while a credit check is run and customer information is verified. If the credit check does not meet MegaDyne standards, the invoice is dropped and the invoice number is not reused.

Mr. Gilmer (PPI) submitted a listing of invoice numbers that were not listed on documents conveyed to him by MegaDyne with his monthly compensation payment. The listing of “missing invoices” was reviewed by the Special Master and explanations for each invoice were noted on the schedules of “missing invoices” (see attached Exhibit 8).

The reason for the large sequence gaps noted by the Plaintiffs on the compensation reports was because the system-generated compensation report was only listing those utilized invoices that contained shipments of product under the agreements.

Samples and Products Rejected in the Coating and Insulating Process

Mr. Failor Agreement

The April 20, 1988 compensation **agreement** provided for payment if and when MegaDyne received payment from customers. There is no mention of payment for samples or rejects in the agreement. Customers would not in the normal course of business be invoiced for samples or rejects and would not normally pay MegaDyne for a sample or reject. Therefore, samples and rejects are not an issue with the Failor/MegaDyne agreement.

Premium Plastics, Inc.

The original compensation agreement that relates to the payment of \$.06 per coated unit was dated March 26, 1991. Section G on page 4 of the agreement states:

“As additional **compensation** for consulting **Gilmer** shall receive payment of a “per unit coated fee” of \$.06 per unit for all MegaDyne products coated with PTFE (SIC) by MegaDyne . . .”

There was no specific mention of samples or rejects in the agreement.

A contract modification dated September 15, 1997 provided the following language in section 3 on page 1:

“Beginning October 1, 1997 and continuing until December 1, 2005 MegaDyne shall pay to Premium each month six cents (\$.06) for each coated electrode invoiced or shipped to a third party for use or resale, including samples and consignments with lot numbers dated on or after September 1, 1997. Returns and Bad Debts will not be debited against payments due Premium.”

During the period of March 1, 1996 through September 30, 1997 the original agreement providing for compensation did not specifically mention if samples or rejects were to be included as compensation units.

The original agreement stated all MegaDyne products coated with PTFE by MegaDyne. The Special Master computed the net coated units for each month during the period March 1, 1996 through September 30, 1997. Thus, the coated units included for compensation would include all coated units whether the units were sold to customers for revenue or distributed as a sample.

An instrument that is included in a batch of coatings but later fails inspection would not be counted as a coated unit. Testimony by Mr. Walter in his statement under oath indicated that an instrument on which a coating is attempted but fails inspection may be reworked if feasible or possible. Each instrument is processed by MegaDyne with the original lot number and batch numbers assigned for purposes of tracking each unit. Mr. Walter stated that a majority of the initially rejected units are discarded rather than rerun.

Thus, MegaDyne if feasible or possible would rework only if time and the process would be able to accommodate a reworked unit prior to the lot and batch moving on to the next process phase.

The rejected unit cannot be reintroduced into a different lot or batch. Therefore, some units that fail the first inspection may be reworked and counted in the original batch as if the item were never rejected. However, if it is not feasible or possible the item may never be reworked and is permanently a rejected unit that cannot be sold or used as a sample or distributed in any manner.

For this reason, the number of units initially introduced in a lot number and batch may be more than the actual net coated units.

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A rejected instrument on which **there** was a failed coating attempt would not normally be **considered** a coated unit as the specific unit could not be used as a coated instrument.

For the period after September 30, 1997, the modified agreement states that each coated electrode (instrument) invoiced or shipped for use or resale including samples and consignments with lot numbers dated after September 1, 1997 are to be compensated to PPI. Also, there is no deduction allowed for returns or bad debts.

Therefore, all initial shipments are subject to compensation without subsequent adjustment.

Production of Coatings During Period February 1, 1997 through September 30, 1997

Mr. Gilmer of Premium Plastics, Inc. noted that for the months of May 1997 through September 1997 the number of coated units for which PPI received compensation was less than in prior months. Because of the lower coating production, Mr. Gilmer was of the opinion that PPI was undercompensated for this period.

Following is a compilation of data from the coating documents and schedules:

	Units			
	Measured Units Coated	Average per Month	Compensation Units Paid	Difference Over (Under) Paid
Period March 1, 1996 through January 31, 1997 (eleven-month period)	3,274,166	297,651	3,712,227	438,061
Period February 1, 1997 through April 30, 1997 (three months)	1,711,670	570,557	1,666,466	(45,204)
Period May 1, 1997 through September 30, 1997 (five months)	487,242	97,448	563,394	76,152
Total eight months	2,198,912	274,864	2,229,860	30,948
Total for nineteen months	5,473,078	288,057	5,942,087	469,009

The above schedule indicates that the eleven months prior to February 1, 1997 the average monthly units coated was 297,651. The three months of February through April 1997 coated production was significantly higher than the prior months. The next five months coated production was less than both the prior eleven month period and the immediately prior three months.

There were documents prepared by both parties regarding the coating production during the periods above. The coating production and the related documents were subject of questions and responses included in statements under oath.

Report of Special Master

The witnesses for which statements under oath were taken were subjected to questions by the Special Master as well as the counsel for both parties.

A number of reasons were indicated as to why coating production fluctuated during these periods. The summation of the documentation and the testimony is that there were a number of reasons why coating production was less during the five months of May through September 1997.

The production during the three months ending April 30, 1997 was significantly in excess of normal coating averages and in excess of sales requirements for those months.

Inventory of coated finished instruments was available to provide customers with coated units even though coating production was low during the five month period.

Some specific items to note:

The average production during the eight months from February 1, 1997 through September 30, 1997 averaged 274,864 units per month.

The eleven months prior to February 1, 1997 averaged 297,651.

Inventory of finished coated units provided units for sale to customers during the period of May through September 1997.

Inventory as of March 1, 1996 (Note A)	1,219,167
Plus coatings March 1, 1996 through April 30, 1997	4,985,836
Less sales March 1, 1996 through April 30, 1997	(4,514,948)
Inventory as of April 30, 1997	<u>1,690,055</u>
Plus coatings May 1, 1997 through September 30, 1997	487,242
Less sales of coatings May 1, 1997 through September 30, 1997	<u>(1,742,494)</u>
Inventory as of September 30, 1997	<u><u>434,803</u></u>

Note A: Computed rollback from September 30, 1997

Investigation and Inquiry Regarding Production of Coated Electrodes by Entities other than Megadyne

No evidence was discovered during review of coatings production and sales of coated electrodes that Megadyne was involved in any agreement or arrangement to have either a controlled entity or a third party entity apply coatings to electrodes or produce coated electrodes. No evidence was discovered indicating that Megadyne purchased coated electrodes for purpose of reselling to customers.

Purchase of uncoated raw material electrodes were accounted for from the purchase of the raw material, through coating production and through sales. Sales of coated electrodes were reconciled with the sales recorded on the records of Megadyne and the sales reported on their financial statements and federal income tax returns. Statements were taken under oath of Mr. Matthias Sansom, Executive Vice-President and Chief Operating Officer; Ms. J. Hall, Controller and Mr. Brian Walter, Production Manager. Testimony of these Megadyne employees and officer (Sansom) under direct examination by the Master and by counsel for the plaintiffs did not disclose that Megadyne was in control of coating product by other entities through any license agreements, subcontracts, controlled entities or other means of producing coated electrodes outside of the Megadyne operations. Testimony also indicated that Megadyne did not have any sales of coated electrodes in addition to the sales as recorded and reported in its records. Testimony by the employees did indicate that Megadyne was successful in litigation matters involving protecting its patents and received judgment and settlement awards in 1995, 1998 and 1999, respectively.

Megadyne Litigation Matters Relating to Patent Protection

MegaDyne initiated legal activities against various entities that produced and sold coated electrodes. MegaDyne was successful in defending its patent and judgments were entered for the benefit of MegaDyne as follows:

Defendants	Judgment Dates	Number of Units	Judgment Award
Aspen Laboratories, Inc.	October 29, 1993	545,038	\$2,092,946*
Aaron Medical Industries	February 4, 1998	Enjoined	Note A
DeRoyal Industrial, Inc. (et. al.)	August 17, 1999	147,835	147,835
	1999	90,000	To be destroyed

* Awarded judgment based on doubling of computed damages.

Note A – Document indicated parties entered into a settlement agreement, however, no units or dollar amounts were indicated. The 1998 financial statements included income from patent litigation of \$155,516.

Report of Special Master

The Aspen Lab award, dated October 1993, was prior to the time period reviewed by the Special Master (March 1, 1996 through March 31, 1999) and, thus, is outside the time scope of our review.

The DeRoyal Industries award of \$147,835 was after the end of the review period of March 31, 1999 and also outside the time scope of our review.

The Special Master will provide assistance in this matter if requested by counsel.

Review of Financial Statements and Federal Income Tax Returns for Calendar Years December 31, 1995, 1996, 1997, 1998 and 1999

The Special Master reviewed the financial statements and the federal income tax returns for the years 1995 through 1999.

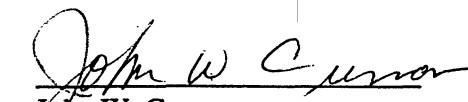
The financial statements are not audited. The financial statements were reviewed by Haynie & Company. The financial statements included balance sheets, statement of income and retained earnings, and cash flows.

The federal income tax returns included related schedules.

Our review of the financial statements and federal income tax returns indicate that the two documents were consistent with each other in the reporting of revenues. During our review we noted the reporting of income from judgments and settlement of patent protection litigation matters. Additional information regarding these judgments and settlements is disclosed in this report. Commission expense was an increasing higher expense during the years 1995 through 1999. Megadyne will provide an explanation of commission expense.

There were no other unusual items noted in our review of the financial statements and federal income tax returns.

The Report of Special Master is submitted on this 3rd day of August, 2000.



John W. Curran
Special Master

EXHIBIT ATTACHMENTS

1. Statements under oath and Exhibits to Statements Nos. 1 to 24.
 - Mr. Failor
 - Mr. Gilmer
 - Ms. Hall
 - Mr. Sansom
 - Mr. Walter
2. Product key of instrument products coated by MegaDyne subject to compensation per the agreements.
 - Copies of section of agreements relating to coated products
 - Per Mr. Failor claimed products
 - Per Premium Plastics, Inc. claimed products
 - Per MegaDyne claimed products
 - Schedule of differences between parties
 - Mr. Failor / MegaDyne
 - Premium Plastics, Inc. / MegaDyne
3. Schedules of payments from MegaDyne to the parties for the period March 1, 1996 through March 31, 1999.
 - Mr. Failor
 - Premium Plastics, Inc.
 - (check copies)
4. Purchased raw material – uncoated instruments.
 - Schedule of purchases from third-party suppliers
 - National Wire
 - Bimco
 - Ellingson
 - Independent confirmation from suppliers
 - Invoice copies have previously been supplied to counsel for parties.
5. Schedule of units coated.
 - Schedule of units – Failor agreement
 - Schedule of units – Premium Plastics, Inc. agreement

Report of Special Master

6. Schedule of units sold.

- Schedule of units – Failor agreement
- Schedule of units – Premium Plastics, Inc. agreement
- Schedule of all revenues
(Reconciliation to general ledger)

7. Inventory

- Coated finished instruments available for sale or distribution as of
 - September 30, 1997
- Raw material inventory

8. Sales invoices

- Schedule of unused invoice numbers including explanation or reason why a specific number used or not used

9. Copies of judicial award judgments relating to MegaDyne litigation to protect patent(s)

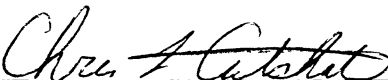
Report of Special Master

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing FINAL REPORT OF SPECIAL MASTER was served via First Class U.S. mail, postage-prepaid, this 3rd day of August, 2000 to the following:

Harold G. Christensen
Rodney R. Parker
Snow, Christensen & Martineau
10 Exchange Place, Suite 1100
Salt Lake City, UT 84111

Dale F. Gardiner
Parry Andersen & Mansfield
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111



Failor Coating Schedule by Unit

Exhibit 5 (revised)

KENNETH L. FAILOR ; AND PREMIUM PLASTICS, INC.
A CALIFORNIA CORPORATION; HARVEY VAN EPPS
GILMER, JR., PLAINTIFFS
V.
MEGADYNE MEDICAL PRODUCTS, INC. A UTAH
CORPORATION ; F.K.A. AMERICAN MEDICAL
PRODUCTS, INC. DEFENDANT

COATINGS	Failor Purchases <u>Total (A)</u>	Failor Coatings <u>Total</u>	Coatings <u>0012 & 0012M</u>	Coatings <u>12A & 12AM</u>	Coatings <u>13 & 13M</u>	Coatings <u>14 & 14M</u>	Coatings <u>14A & 14AM</u>	Coatings <u>0015</u>	Coatings <u>16 & 16M</u>	Coatings <u>16A & 16AM</u>
March-96	375,200	424,400	355,200	6,000		63,200				
April-96	374,000	375,200	300,000	6,000	18,000	50,000		1,200		
May-96	375,200	406,200	332,200	6,000	18,000	50,000				
June-96	374,000	294,700	219,500	6,000	18,000	50,000		1,200		
July-96	380,720	406,200	332,200	6,000	18,000	50,000				
August-96	374,000	348,000	267,800	6,000	18,000	50,000	5,000	1,200		
September-96	375,320	279,300	187,300	6,000	36,000	50,000				
October-96	394,000	55,420	16,100		38,000			1,320		
November-96	18,000	179,000	161,000		18,000					
December-96	376,400	158,900	118,300	6,000		32,200	1,400		1,000	
January-97	377,600	315,600	248,400	12,000	36,000	17,800	1,400			
February-97	409,750	481,350	324,000	12,000	45,000	91,400	4,200	2,250	2,000	500
March-97	385,550	708,350	562,200	6,000	27,000	108,600	2,000	1,050	1,000	500
4/1/1997 - 4/20/1997	387,550	314,805	283,255		27,000		2,000	1,050	1,000	500
	<u>4,977,290</u>	<u>4,747,425</u>	<u>3,707,455</u>	<u>78,000</u>	<u>317,000</u>	<u>613,200</u>	<u>16,000</u>	<u>9,270</u>	<u>5,000</u>	<u>1,500</u>
Number of units paid	<u>5,305,289</u>									
Excess paid over purchased	<u>327,999</u>									
	\$ 0.05									
Amount overpaid to Failor if based on purchases	<u>\$ 16,399.95</u>									

(A) Purchases based on a review of invoices received from MegaDyne, PPI/Failor and confirmation procedures with suppliers.

PPI Schedule of Coated Units

Exhibit 5 (revised)

KENNETH L. FAILOR ; AND PREMIUM PLASTICS, INC.
 A CALIFORNIA CORPORATION; HARVEY VAN EPPS
 GILMER, JR., PLAINTIFFS
 V.
 MEGADYNE MEDICAL PRODUCTS, INC. A UTAH
 CORPORATION ; F.K.A. AMERICAN MEDICAL
 PRODUCTS, INC. DEFENDANT

PPI	Actual Basis to Payment	Units Paid	Actual \$ Payments	Based on Actual Units Coated		Based on Actual Units Sold		Based on Contract Coated/Sold		Differences		
				Units	\$'s	Units	\$'s	Units	\$'s	Per Contract \$ Difference	Units Coated \$ Difference	Units Sold \$ Difference
March-96	n/a	-	-	427,396	\$ 25,643.76	338,463	\$ 20,307.78	427,396	\$ 25,643.76	\$ 25,643.76	\$ 25,643.76	\$ 20,307.78
April-96	Purchases	375,746	\$ 22,544.76	376,200	22,572.00	331,004	19,860.24	376,200	22,572.00	27.24	27.24	(2,684.52)
May-96	Purchases	377,742	22,664.52	411,200	24,672.00	333,380	20,002.80	411,200	24,672.00	2,007.48	2,007.48	(2,661.72)
June-96	Purchases	376,911	22,614.66	296,700	17,802.00	296,441	17,786.46	296,700	17,802.00	(4,812.66)	(4,812.66)	(4,828.20)
July-96	Purchases	375,670	22,540.20	409,200	24,552.00	337,895	20,273.70	409,200	24,552.00	2,011.80	2,011.80	(2,266.50)
August-96	Purchases	383,754	23,025.24	350,000	21,000.00	285,653	17,139.18	350,000	21,000.00	(2,025.24)	(2,025.24)	(5,886.06)
September-96	Purchases	375,899	22,553.94	280,800	16,848.00	306,273	18,376.38	280,800	16,848.00	(5,705.94)	(5,705.94)	(4,177.56)
October-96	Purchases	378,355	22,701.30	60,170	3,610.20	388,281	23,296.86	60,170	3,610.20	(19,091.10)	(19,091.10)	595.56
November-96	Purchases	375,883	22,552.98	183,000	10,980.00	282,957	16,977.42	183,000	10,980.00	(11,572.98)	(11,572.98)	(5,575.56)
December-96	Purchases	376,350	22,581.00	161,900	9,714.00	324,800	19,488.00	161,900	9,714.00	(12,867.00)	(12,867.00)	(3,093.00)
January-97	Coatings	315,917	18,955.02	317,600	19,056.00	378,322	22,699.32	317,600	19,056.00	100.98	100.98	3,744.30
February-97	Coatings	478,124	28,687.44	487,350	29,241.00	267,332	16,039.92	487,350	29,241.00	553.56	553.56	(12,647.52)
March-97	Coatings	724,840	43,490.40	712,770	42,766.20	369,553	22,173.18	712,770	42,766.20	(724.20)	(724.20)	(21,317.22)
April-97	Coatings	463,502	27,810.12	511,550	30,693.00	274,594	16,475.64	511,550	30,693.00	2,882.88	2,882.88	(11,334.48)
May-97	Coatings	35,729	2,143.74	50,613	3,036.78	329,274	19,756.44	50,613	3,036.78	893.04	893.04	17,612.70
June-97	Coatings	69,897	4,193.82	73,053	4,383.18	389,063	23,343.78	73,053	4,383.18	189.36	189.36	19,149.96
July-97	Coatings	129,301	7,758.06	113,438	6,806.28	333,936	20,036.16	113,438	6,806.28	(951.78)	(951.78)	12,278.10
August-97	Coatings	138,892	8,333.52	44,505	2,670.30	328,200	19,692.00	44,505	2,670.30	(5,663.22)	(5,663.22)	11,358.48
September-97	Coatings	189,575	11,374.50	205,633	12,337.98	362,021	21,721.26	205,633	12,337.98	963.48	963.48	10,346.76
		<u>5,942,087</u>	<u>356,525.22</u>	<u>5,473,078</u>	<u>328,384.68</u>	<u>6,257,442</u>	<u>375,446.52</u>	<u>5,473,078</u>	<u>328,384.68</u>	<u>(28,140.54)</u>	<u>(28,140.54)</u>	<u>18,921.30</u>
October-97	Sales	-	-	433,163	25,989.78	282,682	16,960.92	-	-	-	25,989.78	16,960.92
November-97	Sales	14,175	850.50	399,526	23,971.56	280,151	16,809.06	128,030	7,681.80	6,831.30	23,121.06	15,958.56
December-97	Sales	315,902	18,954.12	353,984	21,239.04	327,102	19,626.12	327,102	19,626.12	672.00	2,284.92	672.00
January-98	Sales	288,444	17,306.64	150,351	9,021.06	288,728	17,323.68	288,728	17,323.68	17.04	(8,285.58)	17.04
February-98	Sales	285,802	17,148.12	261,987	15,719.22	286,078	17,164.68	286,078	17,164.68	16.56	(1,428.90)	16.56
March-98	Sales	325,466	19,527.96	299,422	17,965.32	325,518	19,531.08	325,518	19,531.08	3.12	(1,562.64)	3.12
April-98	Sales	262,356	15,741.36	441,165	26,469.90	274,572	16,474.32	274,572	16,474.32	732.96	10,728.54	732.96
May-98	Sales	266,747	16,004.82	410,417	24,625.02	268,389	16,103.34	268,389	16,103.34	98.52	8,620.20	98.52
June-98	Sales	291,159	17,469.54	234,943	14,096.58	269,205	16,152.30	269,205	16,152.30	(1,317.24)	(3,372.96)	(1,317.24)
July-98	Sales	290,742	17,444.52	200,056	12,003.36	293,020	17,581.20	293,020	17,581.20	136.68	(5,441.16)	136.68
August-98	Sales	297,326	17,839.56	147,243	8,834.58	296,318	17,779.08	296,318	17,779.08	(60.48)	(9,004.98)	(60.48)
September-98	Sales	272,700	16,362.00	264,796	15,887.76	274,199	16,451.94	274,199	16,451.94	89.94	(474.24)	89.94
October-98	Sales	285,240	17,114.40	288,124	17,287.44	288,522	17,311.32	288,522	17,311.32	196.92	173.04	196.92
November-98	Sales	290,367	17,422.02	152,798	9,167.88	291,113	17,466.78	291,113	17,466.78	44.76	(8,254.14)	44.76
December-98	Sales	301,469	18,088.14	230,524	13,831.44	303,162	18,189.74	303,162	18,189.74	101.60	(4,256.70)	101.60
January-99	Sales	307,692	18,461.52	313,844	18,830.64	309,067	18,544.02	309,067	18,544.02	82.50	369.12	82.50
February-99	Sales	276,857	16,611.42	293,904	17,634.24	277,564	16,653.84	277,564	16,653.84	42.42	1,022.82	42.42
March-99	Sales	329,177	19,750.62	334,953	20,097.18	331,736	19,904.14	331,736	19,904.14	153.52	346.56	153.52
		<u>4,701,621</u>	<u>282,097.26</u>	<u>5,211,200</u>	<u>312,672.00</u>	<u>5,267,126</u>	<u>316,027.57</u>	<u>4,832,323</u>	<u>289,939.39</u>	<u>7,842.13</u>	<u>30,574.74</u>	<u>33,930.31</u>
		<u>10,643,708</u>	<u>\$ 638,622.48</u>	<u>10,684,278</u>	<u>\$ 641,056.68</u>	<u>11,524,568</u>	<u>\$ 691,474.09</u>	<u>10,305,401</u>	<u>\$ 618,324.07</u>	<u>\$ (20,298.41)</u>	<u>\$ 2,434.20</u>	<u>\$ 52,851.61</u>

Tab 5

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and

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Special Master

**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

KENNETH L. FAILOR; and
PREMIUM PLASTICS, INC.,
a California Corporation;
HARVEY VAN EPPS GILMER, JR.

Plaintiffs,

v.

MEGADYNE MEDICAL PRODUCTS, INC.,
a Utah Corporation, f.k.a.
American Medical Products, Inc.

Defendant

**SPECIAL MASTER RESPONSE TO
PLAINTIFFS AND DEFENDANT OBJECTIONS
AND RECOMMENDATIONS TO THE REPORT
OF SPECIAL MASTER**

Civil No. 980907641

Judge Leon A. Dever

**SUPPLEMENTAL COMMENTS BY SPECIAL MASTER RELATING TO
OBJECTIONS AND RECOMMENDATIONS BY PLAINTIFFS' AND DEFENDANT'S
RESPECTIVE COUNSEL**

FINAL REPORT OF SPECIAL MASTER

Honorable Leon A. Dever
In the Third Judicial District Court
In and for Salt Lake County, State of Utah

Kenneth L. Failor;
and Premium Plastics, Inc.,
a California Corporation;
Harvey Van Epps Gilmer, Jr.,
Plaintiffs

v.

MegaDyne Medical Products, Inc.
a Utah Corporation, f.k.a.
American Medical Products, Inc.
Defendant

Civil No. 980907641

The Special Master submitted his report to the Court and counsel for the parties on June 16, 2000.

Counsel for Defendant, MegaDyne Medical Products, Inc. (MegaDyne) submitted objections and recommendations relating to the Special Master's report. The letter was dated June 26, 2000 and received on the same date by fax.

Counsel for Plaintiffs, Kenneth L. Failor (Failor) and Premium Plastics, Inc., a California corporation (PPI), submitted objections and recommendations relating to the Special Master's report. The Plaintiffs' submission was filed with the Court on July 6, 2000 and received by mail by the Special Master on July 10, 2000.

The Special Master has reviewed in detail the objections and recommendations of both the plaintiffs' and defendant's counsel.

The Special Master has included in his final report to the Court certain of respective counsels' objections and recommendations. Some of the objections and recommendations presented by the respective counsel require an explanation by the Special Master.

The Special Master's comments on each objection and recommendation are included as noted below:

Defendant counsel's objections and recommendations, dated June 26, 2000 –

1. We recommend that the term PTFE be substituted for the word *Teflon* in the report.

Response by Special Master:

- The Special Master substituted PTFE for *Teflon* in the final report.
2. We object to the sentence under History and Summary of Agreements on page 3 that “the initial process to coat electromedical/surgical devices with a Teflon non-stick covering was developed by Mr. Kenneth L. Failor.” This is not true and is inconsistent with the third paragraph of the History. Mr. Failor assisted Dr. G. Marsden Blanch in the development of a PTFE non-stick coating.

Response by Special Master:

- The basis for the statement was a deposition transcript dated July 11, 1997, wherein Mr. Failor describes the initial steps, experiments, and process of development of a coated blade or tip. However, the deposition testimony also indicates that Dr. Blanch was involved with the concept and testing.

Therefore, we have revised our report to state:

Mr. Failor was involved with assisting Dr. G. Marsden Blanch in the initial process to coat electromedical/surgical devices with PTFE non-stick covering.

The third paragraph refers to the Process Technology which was the subject of the Exclusive Product Coating Agreement dated June 1, 1988. The patented Process Technology is the coating process capable of coating instruments in commercial quantities as compared to Mr. Failor's and Dr. Blanch's initial development of the concept and experimental and testing efforts.

3. Since Mr. Failor has insisted upon this accounting, he should be bound by the results, including:
 - Payment-based sales according to the Agreement; and
 - Payment for product only as specified in the Agreement.

“In addition, even if you find royalty due for additional product Nos. 0019, 0020, and 0021 should not be included as MegaDyne has never paid on those items.”

Response by Special Master:

- The Special Master has included the number of units sold based on the written agreement. Supplemental data of the number of coated or deemed to be coated units was also supplied. Plaintiffs and Defendant can use the data as they deem necessary. The issue as to whether Failor is bound by the agreement is a legal issue that cannot be answered by the Special Master. The issue as to which products are to be covered by the agreement is also a legal issue that cannot be answered by the Special Master.
4. MegaDyne objects to the number (\$7,842.12) on the next to the last line on page 13, as it is inconsistent with the underpayment appearing in the next to the last paragraph on page 18 of \$6,831.30, which was apparently due to an oversight.

Response by Special Master:

- The last schedule on page 13 is a summary of the period March 1, 1996 through March 31, 1999, based on coated units and sold units. The number, \$7,842.12, included on the next to last line on page 13, is the amount of underpayment from MegaDyne to PPI for the period October 1, 1997 through March 31, 1999. The details of the number of units and dollar amounts are included in the schedule in the middle of page 13.

On page 18, the section at the top of the page relates to the modification agreement which changed the method of payment from coated units to sold units. The numbers on pages 13 and 18 were not intended to be the same number. The last three paragraphs of the section at the top of page 18 need to be read together. These paragraphs explain the details of an error in computing the amount of payment due for November 1997. Because MegaDyne had previously paid \$.06 for the coated units included in inventory as of September 30, 1997, payments were to be paid on sold units after the first 434,803 units were sold after September 30, 1997.

However, MegaDyne used a lower number of sold units for October and November (448,978) than the actual sold units (562,833), and thus underpaid PPI for 113,855 units. The dollar value at \$.06 is an underpayment only for the month of November 1997 of \$6,831.30. The amount for November 1997 should have been \$7,681.80 (562,833 sold units less inventory of 434,803 equals 128,030 times \$.06), compared to an actual payment of \$850.50, a difference solely for the month of November 1997 of \$6,831.30. Thus the \$6,831.30 is part of the net underpayment and is included in the \$7,842.12.

This explanation was intended to explain the one most significant difference in why there was an underpayment during the period of October 1, 1997 through March 31, 1999.

Exhibit 5 includes the details of payments, coated units, and sold units. The third column from the right totals (\$20,298.41), which is the net difference for the period March 1, 1996 to March 31, 1999.

Exhibit 5 has been modified to show subtotals for the periods during which payments were to be made on coating versus sold units.

5. MegaDyne recommends that the sentence in the fourth paragraph of page 20 stating “each instrument by FDA regulation be processed with the original lot number and batch number assigned for purposes of tracking each unit” be revised. It is not consistent with the testimony of Mr. Walter. Mr. Walter did not indicate that there was a specific FDA regulation to that effect. He felt it was not cost effective to rework small lots, below 100 units, and that it was often not possible to rework larger batches, over 200 units, which resulted in their being scrapped. He said this was largely a judgment call on the part of the supervisor.

Response by Special Master:

- The Special Master has revised the last sentence in paragraph 4 on page 20 as follows:

Each instrument is processed by MegaDyne with the original lot number and batch number assigned for purposes of tracking each unit. Mr. Walter stated that a majority of the rejected units are discarded. (Page 127, line 2-3)

Plaintiffs' objections and recommendations to the Special Master concerning his report. This document was filed with the court on July 6, 2000.

Response by Special Master:

- The document includes specific objections and recommendations relating to the Special Master's report filed June 16, 2000. In addition to specific items included in the Special Master's report, there are other objections that are not specific to the Special Master's report filed, but relate to the Plaintiffs' objection to compliance with the Order of Reference, the process, and miscellaneous objections.

The Special Master will respond to the objections and recommendations that are directly related to the items contained in the report filed June 16, 2000. Revisions have been made where appropriate and explanations offered where appropriate.

The objections and recommendations not directly related to the Special Master's report will be addressed as necessary at a later time, and in the appropriate forum, depending on the issue.

Following is a summary of the Special Master's responses to the Plaintiffs' objections and recommendations directly related to the report filed June 16, 2000.

I. OBJECTIONS AND RECOMMENDATIONS RELATED TO COMPLIANCE AND NONCOMPLIANCE WITH THE ORDER OF REFERENCE

- A. The Special Master's Proposed Report Focuses on an Issue Not Referred to the Special Master (Overpayment v. Underpayment) Instead of the Issue That Was Referred to the Special Master; i.e., the "Amount of Products Coated and Sold under the Parties' Agreements."

A footnote to the objection is as follows:

"The amounts actually paid by MegaDyne never was in dispute. This is demonstrated by the fact that the PPI Plaintiffs did not materially disagree with the schedule of payments prepared by MegaDyne. In other words, there was no need for the Master to determine the amounts paid by MegaDyne and to discover whether there was a dispute on the amounts paid by MegaDyne to the PPI Plaintiffs."

Response by Special Master:

- The relevant sections of the Order of Reference are as follows:

Referred Issues. The issues relating to the amount of the Defendant's products coated and Defendant's coated products sold under the Agreements (attached as Exhibit A through Exhibit E to Plaintiff's Complaint) are hereby referred to the Master.

Duties. The Special Master shall take evidence on, identify, and prepare a report to the Court of his findings as to, the amount of Defendant's products coated and the amount of Defendant's coated products sold under the Agreements. Attached to his report, the Special Master shall include transcripts of any evidentiary proceedings conducted by the Master and copies of any exhibits submitted to the Master.

Response by Special Master to Objection A

The Special Master's report included schedules on pages 9 and 10 relating to plaintiff Failor, and on page 13 relating to plaintiff PPI, summarizing the number of units sold and the number of units coated during the period March 1, 1996 through April 20, 1997. Exhibit 5, an attachment to the report, includes a detailed schedule of sold and coated units for each month for each plaintiff. The number of units for which payment was made is also included in the Exhibit 5 schedules. The Special Master's report does comply with the reporting of units coated and sold.

The objection focuses on additional information supplied and included in the reports.

The objection focuses on limiting the Special Master's report and limiting his powers.

The objection may also focus on the intent of the Order of Reference and the understanding of the respective parties.

The objection also relates to the definition of "amount" used in the Order of Reference.

The objection may also relate to Exhibits A through E, and the complaint, which were referred to the Special Master by attachment to the Order.

Following are additional comments by the Special Master regarding the objection:

- a) The Order of Reference did not define "amount" to be only a number of units.
- b) The Order did not state that the Special Master was to only compute and report upon a number of units coated and/or sold.
- c) The Order is silent as to whether the Special Master may or may not compute and report upon the monetary value of a number of units and whether the amounts are more or less than actual prior payments.
- d) The Plaintiffs and Defendants and the Court may consider the monetary computation as supplemental information to be used at its face value or to be ignored as the parties wish.
- e) Monetary payments to Plaintiffs were made by checks from MegaDyne. Documents discovered during the review process from the Plaintiffs indicated that there were differences and disputes as to the payments received and for which time periods and for what the payments were being

made. Because of these noted differences, the Plaintiffs were asked to verify the actual receipt of the payments from MegaDyne.

- f) The compensation agreements were modified as of September 30, 1997. A review of the computation of the amount due in November 1997 indicated that the payment amount was incorrect and understated the amount due to PPI.
- g) Plaintiffs did indicate differences in payments made to them by MegaDyne.
- h) The verification and review of payments made is an important factor in determining compensation under the agreements, which are the subject of the Order of Reference, and part of the reason for the disputes.

Ignoring the payment part of the equation ignores one-half of the equation, and would only provide a partial and incomplete analysis of the transaction between the parties, relating to the compensation under the agreements.

- i) The complaint dated July 31, 1998 includes as Item No. 43 on page 7, a monetary amount of damages relating to royalty payments totaling a specific amount of \$98,206.30, claimed as being due to Mr. Gilmer from MegaDyne. An answer and counter claim by Defendant (MegaDyne) claims that Mr. Gilmer owes MegaDyne \$2,272.84. The claim and counter claim have been reduced to monetary amounts with a difference of \$100,479.14.
- j) The computation of the claims amount due from MegaDyne to PPI (Gilmer) of \$98,206.30 was included on a copy of a schedule from Andrew M. Sargent, attorney at law, dated December 23, 1997 (page 5).

The computation was based on an assumed estimate of beginning inventory, plus raw material purchases. The total of the estimate of inventory and raw material purchases was multiplied by \$.06 to compute to a monetary value of \$454,631.70. This amount was compared to a total of payments to Mr. Gilmer by MegaDyne totaling \$356,425.40 to compute a difference in monetary value of \$98,206.30. The time period appears to be from April 1, 1996 through September 30, 1997.

This computation is based on estimated inventory of raw material and raw material purchases. However, the agreement provides for payments based on coated product, not on estimates of raw materials, and not on the amount of raw material purchased during the period. The claimed amount does not appear to cover the month of March 1996, or the period subsequent to September 30, 1997.

The objection also indicates that the amounts paid by MegaDyne were never in dispute.

- Failor indicates he was not paid for the month of March 1996, and as of the date of the objections (July 6, 2000), there is a contention that he was not paid for the month of April 1997. On page 16, the fifth paragraph states that Failor was not paid for the

full month of April 1997 or for any part of April 1997. Based on this statement, it would appear that Failor disputes the amounts paid. However, on page 3, footnote 2 indicates that the amounts paid by Megadyne were never in dispute. These statements would appear to contradict each other.

- Mr. Gilmer also indicated that he was not paid for March 1996, and disputes some of the payment amounts.

The detailed schedules in Exhibit 5 include payments by month. This provides a month-by-month comparison and a tracking by month of amounts due and amounts paid, and net over- or underpayment by month.

- If the amounts of payments by MegaDyne are not in dispute, then there is no need for an objection to have the amounts included in the Special Master's report.
- If, in fact, the actual payment history is not in dispute, this factor by itself may be useful to the Court and the parties to establish an agreement on the payments.
- The listing of the payments was intended to assist the parties and the Court. If the listing of the payments is not useful to the parties and the Court, the information can be ignored.

Additional objections are included starting on the bottom of page 3 and numbered 1 through 6. These objections are not directly related to items contained in the Special Master's report. Therefore, responses to these objections will not be included in this response.

II. OBJECTIONS AND RECOMMENDATIONS RELATED TO THE MASTER'S CALCULATIONS OF UNDERPAYMENTS AND OVERPAYMENTS

The objections were segregated between the Plaintiffs, Failor and PPI.

Plaintiff's Objections Relating to Failor (see page 20 for PPI and Gilmer):

Plaintiff states the following:

B. Mr. Failor.

"First, the Master doesn't calculate the underpayment v. overpayment issue in the same way any party to the agreement did. Page 8, paragraph 8, of the draft report explains, '[f]rom March 1996 through December of 1996, payments as computed by MegaDyne to Failor were based on the quantity of blades purchased from outside vendors, or, in some months, based on the quantity of blades thought to have been purchased from other (sic).'¹ And that from January 1, 1997 through April 30, 1997, Mr. Failor's compensation was computed based on units coated as computed by MegaDyne. However, in making the Master's calculation, the Master ignores the principle factor used by MegaDyne from March 1996 through December 1996. If the Master insists on making a finding as to whether Mr. Failor was overpaid or underpaid (and Mr. Failor submits the Master should not), at a bare minimum, the Master ought to include a calculation based on the amount of product purchased between March 1, 1996 and April 20, 1997."

Response by Special Master:

1. The first sentence of this objection states: "First, the Master doesn't calculate the underpayment v. overpayment issue in the same way any party to the agreement did."

Neither party has produced a schedule or calculation relating to the under or overpayment of royalties. Thus, the Special Master has not been provided evidence of a calculation, nor any knowledge of the "same way any party to the agreement did."

2. The information contained on page 8 of the Special Master's report was based on a review of documents and an explanation of the review of the documents.
3. The Special Master's report provided the following in summary form on pages 9 and 10 of the report. For the period March 1, 1996 through April 20, 1997:
 - Coated products unit sold (written agreement is based on sold units).
 - Net coating units (based on Mr. Failor testimony on April 14, 2000).

¹ The actual word used on page 8, paragraph 8, line 4, at the end of the sentence was *vendors*, not *other*.

- Exhibit 5 to the report includes a detailed schedule of the units coated and units sold for each month from March 1996 through April 20, 1997. The monthly numbers were totaled and the same numbers of coated units (4,747,425) and sold units (3,974,777) are included in summary form in the schedules on pages 9 and 10 of the report.
- Exhibit 5 also includes a listing of the number of units for which payments were made, and the amount of payments by each month from April 1996 through April 1997. Also included in the second column from the left is a description of the actual basis for the payments. For example, the months of April 1996 through December 1996 are indicated as based on purchases. During these months, MegaDyne paid royalties based on raw material units purchased from vendors. During the period January 1997 through April 1997, the payments by MegaDyne were made based on MegaDyne's computation of units coated.
- The Special Master provided the number of units sold (agreement basis) and the number of units coated (Failor basis). The Special Master is not aware of evidence offered that a basis for payment to Failor would be based on units of raw materials purchased from vendors.
- The information as to the basis of payment and the number of units and payment in dollars is included in Exhibit 5. It should be noted that if payments were calculated based upon purchases, then duplicate payments would have occurred on units that were purchased prior to December 31, 1996 and coated subsequent to January 1, 1997. Effectively, duplication would have occurred on the raw material inventory at December 31, 1996. The shift in methods in payment by MegaDyne is one reason that Mr. Failor was overpaid during the timeframe in question.
- The Special Master has not revised the report to include a computation on the basis suggested in the objection. However, the information is included in Exhibit 5.

Mr. Failor's second objection is as follows:

Mr. Failor's second objection is that the Master could not possibly have relied upon the original basic documents to determine the number of products coated or the payments made. Instead, the Master relied upon inaccurate electronic downloads. This mistaken reliance creates errors. This is demonstrated by the following table constructed by Mr. Failor using copies of checks, coating reports, and certifications from National Wire & Stamping, Inc. only.

Following is a replication of the table included in the plaintiffs' objections:

Date	Check Number	Payment Amount	Products Coated
06/13/96	21750	\$15,097.50	351,200
08/05/96	23027	18,737.60	375,200
08/14/96	23165	18,687.40	374,000
09/01/96	23417	18,745.85	375,200
10/21/96	24839	18,685.45	374,000
11/26/96	25280	18,939.70	379,000
12/11/96	25409	18,669.45	374,000
01/21/97	23925	18,671.65	394,000
03/12/97	25606	18,817.00	379,000
04/22/97	26060	15,660.30	359,600
06/12/97	26878	23,557.50	471,150
06/24/97	26397	35,463.10	725,723
07/11/97	27275	21,955.90	451,836
		\$261,688.40	5,383,909
Royalty Rate		x	\$0.05
			\$269,195.45
			<u>(\$261,688.40)</u>
Due and Unpaid to Failor			\$ 7,507.05

Special Master's Response:

The Special Master did review basic documents and compiled the number of units coated. The Special Master also reviewed basic check copy documents and listing of payments to plaintiffs. The payments schedule, including dates, check numbers, and amounts, were independently verified by the plaintiffs. There were no electronic downloads used or relied on to determine units coated or payments made to plaintiffs.

Check No. 21750, dated June 13, 1996, in the amount of \$15,097.50 appears to be for payment of 250,750 units shipped as indicated on PPI invoice No. 80579 to MegaDyne and dated March 1, 1996. Based on this document the coatings by PPI would have been prior to March 1, 1996. Based on \$.05 per unit, the royalty would be \$12,537.50. Invoice number 8402, dated March 21, 1996, and a ship date indicated of March 15, 1996, included 51,200 units shipped. The royalty at \$.05 on 51,200 units would be \$2,560. There is no definitive indication as to when these units were coated prior to the March 15, 1996 shipping date.

The above schedule does not include a payment dated March 6, 1997 for check number 24458 in the amount of \$18,673.05. At \$.05 per unit the payment would be for 373,461 units. The check number and payment amount were included on the payment schedule verified by Failor.

The numbers used by Failor in the products coated column are not supported by documents as to the source of the numbers and are not the number of units coated based on the Special Master's review of MegaDyne's coating production reports. Therefore, the following schedule is further revised to include the correct number of units coated rather than plaintiff numbers used.

A schedule including the revisions for the two check amounts is included below. The months for which payments were made are also included in the revised schedule.

				Per Mr. Failor	Actual Coating Production per Documents Reviewed
Month	Date	Check Number	Payment Amount	Products Coated	Products Coated
March 1996	06/13/96	21750	\$ (3)	351,200	424,400
April 1996	08/05/96	23027	18,737.60	375,200	375,200
May 1996	08/14/96	23165	18,687.40	374,000	406,200
June 1996	09/01/96	23417	18,745.85	375,200	294,700
July 1996	10/21/96	24839	18,685.45	374,000	406,200
August 1996	11/26/96	25280	18,939.70	379,000	348,000
Sept 1996	12/11/96	25409	18,669.45	374,000	279,300
Oct 1996	01/21/97	23925	18,671.65	394,000	55,420
Nov 1996	03/06/97	24458	18,673.05	373,461 ⁽¹⁾	179,000 ⁽¹⁾
Dec 1996	03/12/97	25606	18,817.00	379,000	158,900
Jan 1997	04/22/97	26060	15,660.30	359,600	315,600
Feb 1997	06/12/97	26878	23,557.50	471,150	481,350
March 1997	06/12/97	26397	35,463.10	725,723	708,350
April 1997	07/11/97	27275	21,955.90	451,836	314,805 ⁽²⁾
			\$265,263.95	5,757,370	4,747,425
Royalty Rate				x \$0.05	x \$0.05
Royalties Due				\$287,868.50	\$237,371.25
Payment Amount				<u>(\$265,263.95)</u>	<u>(\$265,263.95)</u>
Royalties Due in Excess of Payments				<u>\$ 22,604.55</u>	
Payments in Excess of Royalties Due					<u>\$ 27,892.70</u>

⁽¹⁾ This line not included on Mr. Failor's schedule on pages 7 and 8 of plaintiffs objections.

⁽²⁾ The time period for April coated products is from April 1 to April 20, 1997.

⁽³⁾ Payment of \$15,097.50 is not included for March activity, as explained above, as at least \$12,537.50 was for coatings prior to March 1, 1996, and for the remaining \$2,560 (51,200 units), it is unclear as to when the units were coated.

Special Master Response:

1. The first sentence of the objection above states: “Mr. Failor’s second objection is that the Master could not possibly have relied upon the original basic documents to determine the number of products coated or the payments made.” The Plaintiffs presented this statement but did not supply any documentation to support their allegation that the Special Master did not rely on original basis documentation.

The Special Master did review and rely on documents to support the findings. The basis of the review has been included in the Special Master’s report and documents supporting the review and findings were included as exhibits to the report. Also, documents discovered had been previously delivered to both plaintiffs and defendants and the review of documents was explained in a response letter to plaintiff correspondence. Additionally, documents discovered and reviewed were included as exhibits to statements under oath and were subject to examination and cross-examination by both parties. Also, copies of documents supplied by MegaDyne subsequent to April 1, 2000 have been supplied to both the Special Master and plaintiffs’ counsel.

If the parties have or had knowledge of additional documentation that has been requested by the Special Master, they are requested to produce the documents.

Some examples of documents discovered, and relied upon by the Special Master, included but were not limited to:

- Purchase invoices from vendor suppliers of raw materials. For example, from National Wine, Ellingson and Bimco.
- Confirmation of purchases of raw materials received directly by Ernst & Young from the vendors.
- MegaDyne documents of lot numbers issued when raw materials were purchased and received from vendors.
- MegaDyne documents of batch numbers.
- MegaDyne coated production reports.
- Check copies from MegaDyne to Failor relating to payment of royalties. The copies have been included in Exhibit to the Special Master’s report. Also, a listing of the check numbers and amounts was presented to Failor for his independent review and verification.

Counsel for plaintiff (Mr. Failor) states on page 7 in the second paragraph that “the Master relied upon inaccurate electronic download.”

The Special Master’s response:

This statement does not specify what electronic downloads the plaintiffs are asserting are inaccurate. The plaintiffs must be more specific as to what downloads they are referring to and also what specific inaccuracy the plaintiffs allege. If plaintiffs have specific evidence of any inaccuracies related to documents discovered by either party and documents used in determination of units coated,

units sold, or payments made or any other related documents, the plaintiffs should present this to the Special Master for his review and determination as to the relevance in this matter. If no specific documentation supporting the alleged inaccuracies is offered, the Special Master will not be able to consider evidence as to whether the downloads referred to are accurate or inaccurate.

The Special Master has verified the accuracy of electronic information in two meaningful ways. First, the integrity of such data was verified by agreeing totals to certain accounting reports. Second, statistical sampling techniques were performed and results indicated electronic data was indeed an electronic form of all hard-copy invoices.

The plaintiffs alleges “this mistaken reliance creates errors.” (page 7, paragraph 2)

The Special Master Response:

The Special Master is not able to determine what this sentence refers to. What specific documentation and proof is there that there is a mistake or a mistaken reliance, and what specific errors are documented?

The plaintiffs have not presented to the Special Master specific documents of errors. The Special Master will review any specific documents offered to support these allegations if any are presented.

The plaintiffs state that specific check numbers and amounts are “short” as follows:

Month	Check Number	Actual Amount	Amount Alleged “Short”	Total Amount of Actual, Plus Alleged Amount Short
December 1996	23925	\$18,671.65	\$1,000.00	\$19,671.65
November 1996	24458	18,673.05	150.00	18,823.05
January 1997	26060	15,660.30	2,325.30	17,985.60
March 1997	26397	35,463.10	3,054.50	38,517.60
		<u>\$88,468.10</u>	<u>\$6,529.80</u>	<u>\$94,997.90</u>

Based on the total of actual check amounts plus alleged short amounts, the total number of units would be computed as follows, based on \$.05 per unit:

	Check Number	Total Actual Plus Alleged "Short"	Computed Number of Units at \$.05
December 1996	23925	\$19,671.65	393,433
November 1996	24458	18,823.05	376,461
January 1997	26060	17,985.60	359,712
March 1997	26397	38,517.60	770,352

There is no specific documentary evidence offered to support that the alleged computed numbers of units are the correct numbers of units for these periods.

The plaintiffs state that the Special Master did not consider royalties due for bulk sales, resales, or contract sales.

Special Master's Response:

This is an incorrect statement alleged by plaintiffs. The Special Master considered all sales.

There was no documentation offered or included in the plaintiffs' objections that supported this statement.

If there is documentation to prove this allegation, the plaintiff should provide the documents to support their position.

Exhibit 6 attached to the Special Master's report indicates that 97.35% of the dollar value of all of MegaDyne's sales were included in the PPI listing of coated units sold. The percentage of total sales for Failor would be less than 97.35% as not all of the products covered by the PPI agreement are included in the Failor agreement.

The plaintiffs included an amount of \$59,400 that would be owed to Failor if the Court settlements were included.

Special Master's Response:

There was no computation included in the plaintiffs' objections as to how this figure was computed. The Special Master included information relating to MegaDyne litigation matters on page 25 of the report.

The plaintiffs summarized on page 9 objections and suggestions as follows:

“The calculations should be based on original documents, the Master should compare the checks with the products coated as Mr. Failor has done.”

Special Master’s Response:

- The Special Master has used original documents, and has listed and presented for comparison purposes the amounts of check payments, and units related to the check payments, with coated units. (See Exhibit 5 to Report of Special Master)

The Special Master should include the favorable judgments to MegaDyne.

Special Master’s Response:

- The Special Master reviewed the documents made available from MegaDyne relating to favorable judgments received and summarized the information in his report.

The Special Master is not in a position to determine as to whether Failor or PPI are entitled to compensation from any settlements or judgments received by MegaDyne from other parties. This is a legal matter to be determined between the parties and the Court.

The Order of Reference did not indicate that the Special Master would be asked to present a determination on this matter and the Special Master has not offered a determination on this matter. However, the Special Master disclosed information obtained during the discovery process.

The Special Master has indicated that he is willing to assist the parties in this matter if requested to provide assistance.

“and finally the Master should run a calculation based upon the method actually used by MegaDyne, i.e., the quantity of blades purchased from outside vendors, or, in some months, based on the quantity of blades thought to have been purchased from vendors.”

Special Master's Response:

This information is included in Exhibit No. 5 (Failor) as previously stated in this response.

As indicated previously, this computation would not be based on either the written agreement or Failor's statement under oath on this subject or his view of how he should be compensated based on a precedent.

PLAINTIFFS' OBJECTIONS RELATING TO PREMIUM PLASTICS, INC. AND MR. GILMER

Plaintiffs state the following:

Mr. Gilmer calculates that he is owed at a bare minimum \$59,815.10.

"The difference can be explained in part by the fact that the basic documents provided from MegaDyne to Mr. Gilmer established that MegaDyne coated at least 341,783 pieces on an average per month, whereas Ernst & Young, in relying on inaccurate electronic downloads, somehow without explanation concludes that only 295,656 pieces were coated on an average per month.

Special Master's Response:

The above objection includes a figure of 341,783 pieces as an average per month. The objection does not provide an explanation of how the 341,783 was computed. A mention is made of basic documents but there is no specific indication as to what basic documents would have been used to compute the number. There is also no indication of the time period for which the number of 341,783 was derived. The statement by the plaintiffs is not supported by a calculation or any documents.

The statement states that Ernst & Young is relying on inaccurate electronic downloads.

There is no indication as to what electronic downloads to which the plaintiffs are referring. Electronic downloads were not used by Ernst & Young to compute the number of coated units. The Special Master also has no knowledge that MegaDyne used electronic downloads to compute the number of units coated.

The plaintiffs' statement indicates that Ernst & Young concludes that only 295,656 pieces on an average were coated per month.

The plaintiffs do not indicate how the 295,656 number was calculated by the plaintiffs. The plaintiffs do not indicate if the number of 341,783 that the plaintiffs used was for the same comparable period that the 295,656 was computed.

The Special Master's report did not include a specific number of 295,656 as a computation of an average for a period of time. The Special Master does not understand the position of the plaintiffs or how the plaintiffs would make a statement that the Special Master concluded a number of 295,656 on average when that number is not stated in the report.

The computations of average coatings per month are included on pages 21 and 22 of the Special Master's report. There are a number of averages of units coated computed; however, none of the numbers is 295,656.

In an attempt to try to determine where the number may have been derived and computed, the Special Master noted that on page 13 of the Special Master's report and included in the first table on the top of the page, there is a total of coated units of

2,956,566 for the ten-month period of March 1, 1996 through December 31, 1996. This would compute to 295,656 for this period (2,956,566 divided by 10 months). However, the Special Master did not specifically compute the number and did not include that number in the report. Therefore, it is the plaintiffs that have computed this number and concluded the number for the Special Master without a discussion with the Special Master.

On page 10 at the top, the plaintiffs included a schedule of the plaintiffs' computation of "Royalties Earned" and payments and computed an underpayment based on their computation of \$59,815.10. The time period was from March 1, 1996 through September 30, 1997. During this time period, PPI was to be compensated according to the agreement based on units coated.

The amounts included in the schedule by supplier vendor are included in the column on the left. The Special Master computed the number of units based on \$.06 per unit.

<u>Supplier</u>	<u>Royalties Earned</u>	<u>Computed Units at \$.06 per Unit</u>
National Wire	\$388,319.00	6,471,983
Ellingson	27,262.00	454,367
Bimco	758.34	12,639
	<u>\$416,339.34</u>	<u>6,938,989</u>

The plaintiffs do not provide any supporting calculations as to how the numbers were computed, nor were any details included as to the amounts for each month. Also, no documents were included in the plaintiffs' objections as to the amounts and how the numbers were derived for each vendor/supplier. Additionally, it is unclear if the computed royalties were based on units coated or on units purchased.

For the time period March 1, 1996 through September 30, 1997, the Special Master's review and investigation indicated the following amounts, which are also included in the Special Master's report on page 13 and in Exhibit 5 (PPI).

	<u>Units Paid Upon</u>	<u>Units Coated</u>	<u>Units Paid Upon in Excess of Coatings</u>
Period March 1, 1996 through September 30, 1997	<u>5,942,087</u>	<u>5,473,078</u>	<u>469,009</u>

The computed number of units based on the claimed \$416,339.34, totaling 6,938,989 for the period March 1, 1996 through September 30, 1997, is not supported by documents reviewed. If the plaintiffs have supporting documents or established information, the Special Master will review the documents.

On page 10 in the first paragraph after the schedule, the plaintiffs state the following:

“The Master’s report incorrectly asserts that there is not a payment dispute for a period of time prior to March 31, 1996.” The statement continues and indicates that Mr. Gilmer was not paid from November 1995 to March 1, 1996, and was not paid for March 1996.

Special Master’s Response:

The Special Master in his report did not state that there is no payment dispute for a period of time prior to March 31, 1996 that would relate to coatings by MegaDyne.

The statement that was made is included on page 12 in paragraph 2. The subject matter of this paragraph is the payments made from MegaDyne to PPI for the process application of coatings to instruments. The paragraph did not mention royalty payments.

The statement by the Special Master on page 12 is:

“The Special Master is not aware of any continuing specific disputes as to the amounts of payments made to PPI based on the coating application and the units reported and invoiced by PPI to MegaDyne prior to March 1, 1996.”

The Special Master did not review the payments from MegaDyne to PPI, prior to March 1, 1996, for the coating process. PPI would have rendered invoices to MegaDyne, and if PPI was not paid for these rendered invoices that is a separate issue not included in the Order of Reference. Also, the time period is prior to March 1, 1996, which is prior to the time period under review by the Master. If there is a dispute on the issue of payments for the application process, the Master is not aware of the dispute.

The Special Master is aware that there does not appear to be a payment from MegaDyne to PPI for the royalty payment for the month of March 1996. This is indicated on Exhibit 5 (PPI) where no payment is indicated for March 1996.

Based on the agreements, Mr. Gilmer was to be paid either for the process application on a per-unit basis when PPI was applying coatings or at a royalty payment of \$.06 per unit, but not both payments for the same units. The \$.06 would be paid after PPI ceased applying coatings to instruments.

The plaintiffs’ objections included on page 10 in the second paragraph relates to missing invoices. The objection indicates that the Special Master has not taken into consideration the missing invoices.

Special Master’s Response:

The statement that the Special Master has not taken into consideration missing invoices is not correct.

The plaintiffs have continued to use the term missing invoices for over a year. However, the term missing is misleading. Invoice numbers that were used for non-coated or non-agreement products were not included in listings of invoices provided to the plaintiffs by MegaDyne. The invoice numbers provided were invoices used for coated products under the agreements. A detailed review of the listing of invoice numbers provided by Mr. Gilmer indicated a significant number of the invoices were invoices for freight charges. These are not “missing” invoices and are not invoices for coated instruments. Also, invoices that were voided were not used but are not missing. Invoice numbers not used because they were at the end of a batch of invoice numbers were also explained and are unused invoice numbers, but not missing. The plaintiffs provided a list of invoice numbers that did not show on documents provided with payments to plaintiffs. Ernst & Young investigated each one of these invoice numbers listed and provided a listing and explanation for each one. This was provided to the plaintiffs by correspondence. Also, a listing of the invoices and the explanations were provided in the Special Master’s report in Exhibit 8—Schedule of unused invoice numbers and explanations.

The information has been provided twice to the plaintiffs. If the plaintiffs continue to have questions after reviewing and studying the list and the explanations, the Special Master will respond.

**SECTION IV – MISCELLANEOUS OBJECTIONS AND RECOMMENDATIONS
RAISED BY CERTAIN PARAGRAPHS IN THE MASTER’S REPORT**

The following objections and recommendations relating to the Special Master’s report are responded to. Items not directly related to the Special Master’s report are not responded to in this document but will be responded to as is appropriate.

<u>Objection and Recommendation</u>	<u>Special Master’s Response</u>
Time period under review, page 3	The agreed time period is March 1, 1996 to March 31, 1999. This period was discussed in the original planning meeting. Mr. Gardiner’s work plan document also included the start period from March 1, 1996.
Failor’s Compensation Agreement, April 20, 1988, page 3	The Special Master has read and reviewed the agreement. Section 1 indicates compensation to be paid only for products specifically listed. Both parties have listed the products they respectively consider to be covered under the agreement. Any disputes will need to be resolved by the parties.
Excluding (sic) Product Coating Agreements – June 1, 1988	Exclusive is the correct word and was spelled correctly.

Objection and Recommendation

Master was not asked to identify the agreements.

Special Master fails to acknowledge that the condition precedent in the second agreement with PPI did not occur.

Page 5, lines 20-21

The obligation imposed under the June 1, 1988 agreement were not continued to be imposed.

Page 6, lines 1-3

Because PPI was not paid the additional \$0.06, these three lines are immaterial and should be deleted.

Page 6, lines 6-8

The Special Master's report fails to acknowledge that invoices were not supplied to PPI.

Special Master's Response

The agreements were provided and are the foundation of the agreements between the parties and the subject of the dispute.

The Special Master reviewed the agreements supplied as a foundation and supporting documentation.

The agreements also included specific information regarding the transition period for PPI's compensation basis from coated units to sold units.

In the Special Master's report on page 5, the fourth paragraph states "the three-year period ended March 25, 1994 and PPI was not sold by Gilmer as of that date." This does acknowledge that the condition precedent did not occur.

The agreement dated March 26, 1991, on page 2 under item No. 2 Modification and Continuance of 1988 Agreement, states in the last sentence "all obligations imposed under the 1988 agreement shall continue to be imposed upon and shall be performed by PPI for all MegaDyne products for which PPI shall continue to or shall hereafter apply the coating." Thus, the statement in the Special Master's report is correct on page 5, line 20-21.

PPI would be relieved of obligations only if the condition precedent occurred.

This statement is based on paragraph H on page 4 of the March 26, 1991 agreement. If it is immaterial, the statement can be ignored by the parties.

This is a matter to be resolved between the parties, and has no bearing on the procedures and findings of the Special Master.

Objection and Recommendation

Page 7, lines 15-17

The Special Master fails to acknowledge that the agreement didn't say whether the royalty was to be paid on product sales or products coated.

Page 7

This statement is incorrect. The materials sent by MegaDyne to Mr. Failor with his check shows that there was an agreement to be paid on products coated.

Page 8, last paragraph

Failor was not paid for the full month of April 1997, or for the period through April 21, 1997.

Page 8, next to last paragraph

Plaintiffs were never given a choice as to how MegaDyne did its calculations from March 1996 through December 1996.

Page 9, bottom table

Plaintiffs state that the numbers are in error.

Special Master's Response

Page 7, lines 13-16 states:

"...the \$.05 compensation to be paid monthly based on the actual units sold to customer of AMP (MegaDyne)."

The Special Master's review of materials received by Mr. Failor did not indicate any agreement to be paid on products coated, other than the fact that MegaDyne based its payments to Mr. Failor on what it believed to be units coated. The last two lines of page 7 indicate that MegaDyne made payments to Mr. Failor based on "the precedent of payments being made to him based on coatings."

The Special Master's review of payments indicates that Failor was paid for the full month of April 1997 in the amount of \$21,955.90 on July 11, 1997, check No. 27275. The amount would be for 439,118 units which is the full month of April 1997's coated production, rather than only through April 20, 1997 which was 314,805 units.

This is a matter to be resolved by the parties.

Plaintiffs indicate the correct number of coated products sold should be 5,396,321 units. There was no documentation provided as to how the amount was computed. There was no indication or documents as to the time period that the number related to. The coated product units sold based on the Special Master's review for the period March 1, 1996 through April 20, 1997 totaled 3,974,777, which is indicated on page 9 and also in Exhibit 5 on a monthly basis.

Objection and Recommendation

Special Master's Response

The plaintiff's number of 5,396,321 is not the number of sold units nor does it reflect the amounts actually paid. The amount on page 17 of objections is different from the number included in page 8. Also, the amount of payments on page 8 does not appear to be accurate and would be different from the amount that would be used to compute an underpayment of \$4,551.59 ($\$269,815.04 - \$4,551.59 = \$265,263.45$).

Page 10
These calculations are in error

The plaintiffs have not indicated specifically which calculations they allege are in error and did not provide documentation to support their statement.

Pages 11 and 12
"Further, the last paragraph on page 12 is incorrect. From March 1, through December 31, 1996, Mr. Gilmer and PPI were paid on the basis of coated products."

The date in the heading—March 1, 1999—has been revised to March 1, 1996.

The period from March 1, 1996 to December 31, 1996 payments were made to PPI and Failor based on purchases. This was perhaps not the intent of MegaDyne nor the agreement, however, based on a review of the payments in comparison to units purchased and units coated, it is clear that the payments were made upon units purchased until January 1997 when payments began to mirror units coated.

Page 13, middle table

The inventory included on page 13, middle table, is the coated finished inventory as of September 30, 1997. The inventory listing is included as Exhibit 7. This inventory document was prepared by MegaDyne and was the subject of direct and cross-examination by the Special Master and counsel during the Statements Under Oath. The number of units included on the schedule were 434,803 units—not dollars.

Objection and Recommendation

Special Master's Response

Page 15, middle paragraph
The PPI plaintiffs question whether the Special Master has obtained all the invoices. The Special Master has not supplied the National Wire invoices.

The 60,000 units referred to are not specified in the plaintiffs' objections as to whether the number is raw materials or finished goods. Schedules reviewed by the Special Master during its review indicated that the 60,000 was an estimated amount of raw material units as of March 1, 1996 as included on Haynie & Co. These numbers are not comparable to finished goods and the other appears to be raw materials. Also, the dates are not comparable.

The Special Master has obtained the invoices and compared the invoices to the transcript of invoice listing independently confirmed directly from National Wire to Ernst & Young. The invoices were supplied to the plaintiffs and are included in the Special Master's report by reference.

Page 16, sterilization documents
The Special Master ignored the sterilization documents. The plaintiffs allege that more product was shipped than suggested by the Special Master's report.

The Special Master did not ignore the sterilization documents. The Special Master explained the sterilization documents on page 16 of the report.

Page 17, paragraphs 1-4

The statement sampling process was described on page 17.

The 97% figure was not based on a witness account but on computations included in Exhibit 6, as previously described.

The figure of 97% was not based on a monthly coating inventory of \$1,500,000. However, total MegaDyne sales were about \$1,500,000 per month.

Page 18, second paragraph

This has been previously addressed on page 27.

Objection and Recommendation

Page 18, fourth paragraph
Why the 434,803 units were never sold is never explained. They somehow, apparently disappeared.

Page 19, third paragraph

Page 19, last line

Page 21 – the coating documents v. schedules table

Special Master's Response

The 434,803 represents finished coated instruments available for sale as of September 30, 1997.

These items had been coated prior to September 30, 1997, and PPI received payment when the units were coated and when the agreement required payment based on coated production.

Subsequent to September 30, 1997, these units were available for sale. However, when the agreement compensation method changed, the parties agreed to deduct the 434,803 from future sales before resuming payment at \$.06 per unit. The 434,803 units were sold in the normal course of business. The units did not disappear.

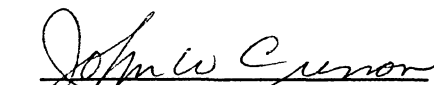
The plaintiffs questions relating to invoices have been explained above. The Special Master did not rely on Mr. Walters' testimony relating to 3%. The Special Master computed the 97.35% from sales records independent of Mr. Walters.

The Special Master's sentence on page 19 relating to rejects has been expanded.

The plaintiffs' objection uses a number of 2,294,746 without indicating how the number was computed.

The plaintiffs also indicate a total for nine months is 6,010,467 and 5,473,078, also without any documentation as to how the numbers were computed.

The Report of Special Master is submitted on this 3rd day of August, 2000.



John W. Curran
Special Master

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing SPECIAL MASTER RESPONSE TO PLAINTIFFS AND DEFENDANT OBJECTIONS AND RECOMMENDATIONS TO THE REPORT OF SPECIAL MASTER was serviced, via First Class U.S. mail, postage-prepaid, this 3rd day of August 2000 to the following:

Harold G. Christensen
Rodney R. Parker
Snow, Christensen & Martineau
10 Exchange Place, Suite 1100
Salt Lake City, Utah 84111

Dale F. Gardiner
Parry Andersen & Mansfield
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111



Failor Coating Schedule by Unit

Exhibit 5 (revised)

KENNETH L. FAILOR ; AND PREMIUM PLASTICS, INC.
A CALIFORNIA CORPORATION; HARVEY VAN EPPS
GILMER, JR., PLAINTIFFS
V.
MEGADYNE MEDICAL PRODUCTS, INC. A UTAH
CORPORATION , F.K.A. AMERICAN MEDICAL
PRODUCTS, INC. DEFENDANT

COATINGS	Failor Purchases Total (A)	Failor Coatings Total	Coatings 0012 & 0012M	Coatings 12A & 12AM	Coatings 13 & 13M	Coatings 14 & 14M	Coatings 14A & 14AM	Coatings 0015	Coatings 16 & 16M	Coatings 16A & 16AM
March-96	375,200	424,400	355,200	6,000		63,200				
April-96	374,000	375,200	300,000	6,000	18,000	50,000		1,200		
May-96	375,200	406,200	332,200	6,000	18,000	50,000				
June-96	374,000	294,700	219,500	6,000	18,000	50,000		1,200		
July-96	380,720	406,200	332,200	6,000	18,000	50,000				
August-96	374,000	348,000	267,800	6,000	18,000	50,000	5,000	1,200		
September-96	375,320	279,300	187,300	6,000	36,000	50,000				
October-96	394,000	55,420	16,100		38,000			1,320		
November-96	18,000	179,000	161,000		18,000					
December-96	376,400	158,900	118,300	6,000		32,200	1,400		1,000	
January-97	377,600	315,600	248,400	12,000	36,000	17,800	1,400			
February-97	409,750	481,350	324,000	12,000	45,000	91,400	4,200	2,250	2,000	500
March-97	385,550	708,350	562,200	6,000	27,000	108,600	2,000	1,050	1,000	500
4/1/1997 - 4/20/1997	387,550	314,805	283,255		27,000		2,000	1,050	1,000	500
	<u>4,977,290</u>	<u>4,747,425</u>	<u>3,707,455</u>	<u>78,000</u>	<u>317,000</u>	<u>613,200</u>	<u>16,000</u>	<u>9,270</u>	<u>5,000</u>	<u>1,500</u>
Number of units paid	<u>5,305,289</u>									
Excess paid over purchased	<u>327,999</u>									
\$	0.05									
Amount overpaid to Failor if based on purchases	<u>\$ 16,399.95</u>									

(A) Purchases based on a review of invoices received from MegaDyne, PPI/Failor and confirmation procedures with suppliers.

PPI Schedule of Coated Units

Exhibit 5 (revised)

KENNETH L. FAILOR ; AND PREMIUM PLASTICS, INC.
 A CALIFORNIA CORPORATION; HARVEY VAN EPPS
 GILMER, JR., PLAINTIFFS
 V.
 MEGADYNE MEDICAL PRODUCTS, INC. A UTAH
 CORPORATION ; F.K.A. AMERICAN MEDICAL
 PRODUCTS, INC. DEFENDANT

PPI	Actual Basis fo Payment	Actual Units Paid	Actual \$ Payments	Based on Actual Units Coated		Based on Actual Units Sold		Based on Contract Coated/Sold		Differences		
				Units	\$'s	Units	\$'s	Units	\$'s	Per Contract \$ Difference	Units Coated \$ Difference	Units Sold \$ Difference
March-96	n/a	-	-	427,396	\$ 25,643.76	338,463	\$ 20,307.78	427,396	\$ 25,643.76	\$ 25,643.76	\$ 25,643.76	\$ 20,307.78
April-96	Purchases	375,746	\$ 22,544.76	376,200	22,572.00	331,004	19,860.24	376,200	22,572.00	27.24	27.24	(2,684.52)
May-96	Purchases	377,742	22,664.52	411,200	24,672.00	333,380	20,002.80	411,200	24,672.00	2,007.48	2,007.48	(2,661.72)
June-96	Purchases	376,911	22,614.66	296,700	17,802.00	296,441	17,786.46	296,700	17,802.00	(4,812.66)	(4,812.66)	(4,828.20)
July-96	Purchases	375,670	22,540.20	409,200	24,552.00	337,895	20,273.70	409,200	24,552.00	2,011.80	2,011.80	(2,266.50)
August-96	Purchases	383,754	23,025.24	350,000	21,000.00	285,653	17,139.18	350,000	21,000.00	(2,025.24)	(2,025.24)	(5,886.06)
September-96	Purchases	375,899	22,553.94	280,800	16,848.00	306,273	18,376.38	280,800	16,848.00	(5,705.94)	(5,705.94)	(4,177.56)
October-96	Purchases	378,355	22,701.30	60,170	3,610.20	388,281	23,296.86	60,170	3,610.20	(19,091.10)	(19,091.10)	595.56
November-96	Purchases	375,883	22,552.98	183,000	10,980.00	282,957	16,977.42	183,000	10,980.00	(11,572.98)	(11,572.98)	(5,575.56)
December-96	Purchases	376,350	22,581.00	161,900	9,714.00	324,800	19,488.00	161,900	9,714.00	(12,867.00)	(12,867.00)	(3,093.00)
January-97	Coatings	315,917	18,955.02	317,600	19,056.00	378,322	22,699.32	317,600	19,056.00	100.98	100.98	3,744.30
February-97	Coatings	478,124	28,687.44	487,350	29,241.00	267,332	16,039.92	487,350	29,241.00	553.56	553.56	(12,647.52)
March-97	Coatings	724,840	43,490.40	712,770	42,766.20	369,553	22,173.18	712,770	42,766.20	(724.20)	(724.20)	(21,317.22)
April-97	Coatings	463,502	27,810.12	511,550	30,693.00	274,594	16,475.64	511,550	30,693.00	2,882.88	2,882.88	(11,334.48)
May-97	Coatings	35,729	2,143.74	50,613	3,036.78	329,274	19,756.44	50,613	3,036.78	893.04	893.04	17,612.70
June-97	Coatings	69,897	4,193.82	73,053	4,383.18	389,063	23,343.78	73,053	4,383.18	189.36	189.36	19,149.96
July-97	Coatings	129,301	7,758.06	113,438	6,806.28	333,936	20,036.16	113,438	6,806.28	(951.78)	(951.78)	12,278.10
August-97	Coatings	138,892	8,333.52	44,505	2,670.30	328,200	19,692.00	44,505	2,670.30	(5,663.22)	(5,663.22)	11,358.48
September-97	Coatings	189,575	11,374.50	205,633	12,337.98	362,021	21,721.26	205,633	12,337.98	963.48	963.48	10,346.76
		5,942,087	356,525.22	5,473,078	328,384.68	6,257,442	375,446.52	5,473,078	328,384.68	(28,140.54)	(28,140.54)	18,921.30
October-97	Sales	-	-	433,163	25,989.78	282,682	16,960.92	-	-	-	25,989.78	16,960.92
November-97	Sales	14,175	850.50	399,526	23,971.56	280,151	16,809.06	128,030	7,681.80	6,831.30	23,121.06	15,958.56
December-97	Sales	315,902	18,954.12	353,984	21,239.04	327,102	19,626.12	327,102	19,626.12	672.00	2,284.92	672.00
January-98	Sales	288,444	17,306.64	150,351	9,021.06	288,728	17,323.68	288,728	17,323.68	17.04	(8,285.58)	17.04
February-98	Sales	285,802	17,148.12	261,987	15,719.22	286,078	17,164.68	286,078	17,164.68	16.56	(1,428.90)	16.56
March-98	Sales	325,466	19,527.96	299,422	17,965.32	325,518	19,531.08	325,518	19,531.08	3.12	(1,562.64)	3.12
April-98	Sales	262,356	15,741.36	441,165	26,469.90	274,572	16,474.32	274,572	16,474.32	732.96	10,728.54	732.96
May-98	Sales	266,747	16,004.82	410,417	24,625.02	268,389	16,103.34	268,389	16,103.34	98.52	8,620.20	98.52
June-98	Sales	291,159	17,469.54	234,943	14,096.58	269,205	16,152.30	269,205	16,152.30	(1,317.24)	(3,372.96)	(1,317.24)
July-98	Sales	290,742	17,444.52	200,056	12,003.36	293,020	17,581.20	293,020	17,581.20	136.68	(5,441.16)	136.68
August-98	Sales	297,326	17,839.56	147,243	8,834.58	296,318	17,779.08	296,318	17,779.08	(60.48)	(9,004.98)	(60.48)
September-98	Sales	272,700	16,362.00	264,796	15,887.76	274,199	16,451.94	274,199	16,451.94	89.94	(474.24)	89.94
October-98	Sales	285,240	17,114.40	288,124	17,287.44	288,522	17,311.32	288,522	17,311.32	196.92	173.04	196.92
November-98	Sales	290,367	17,422.02	152,798	9,167.88	291,113	17,466.78	291,113	17,466.78	44.76	(8,254.14)	44.76
December-98	Sales	301,469	18,088.14	230,524	13,831.44	303,162	18,189.74	303,162	18,189.74	101.60	(4,256.70)	101.60
January-99	Sales	307,692	18,461.52	313,844	18,830.64	309,067	18,544.02	309,067	18,544.02	82.50	369.12	82.50
February-99	Sales	276,857	16,611.42	293,904	17,634.24	277,564	16,653.84	277,564	16,653.84	42.42	1,022.82	42.42
March-99	Sales	329,177	19,750.62	334,953	20,097.18	331,736	19,904.14	331,736	19,904.14	153.52	346.56	153.52
		4,701,621	282,097.26	5,211,200	312,672.00	5,267,126	316,027.57	4,832,323	289,939.39	7,842.13	30,574.74	33,930.31
		10,643,708	\$ 638,622.48	10,684,278	\$ 641,056.68	11,524,568	\$ 691,474.09	10,305,401	\$ 618,324.07	\$ (20,298.41)	\$ 2,434.20	\$ 52,851.61

** Amounts not detail tested. Obtained from MegaDyne internal records.

Tab 6

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Special Master

**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

KENNETH L. FAILOR; and
PREMIUM PLASTICS, INC.,
a California Corporation;
HARVEY VAN EPPS GILMER, JR.

Plaintiffs,

v.

MEGADYNE MEDICAL PRODUCTS, INC.,
a Utah Corporation, f.k.a.
American Medical Products, Inc.

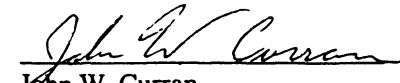
Defendant

**REPLY TO EXPERT REPORT PREPARED BY
CAMPOS & STRATIS**

Civil No. 980907641

Judge Leon A. Dever

The Reply To Expert Report Prepared By Campos & Stratis is submitted on this 23 day of October 2000.

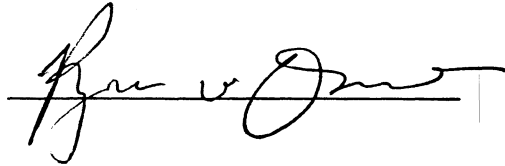

John W. Curran
Special Master

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply To Expert Report Prepared By Campos & Stratis was serviced, via First Class U.S. mail, postage-prepaid, this 23 day of October 2000 to the following:

Harold G. Christensen
Rodney R. Parker
Snow, Christensen & Martineau
10 Exchange Place, Suite 1100
Salt Lake City, Utah 84111

Dale F. Gardiner
Parry Andersen & Mansfield
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Rodney R. Parker", is written over a horizontal line.

Plaintiff's Motion to Reject Special Master's Report

Page 3 of the Plaintiff's Motion to Reject the Master's Report states, "The Special Master's Report is clearly and completely erroneous." The Motion then describes a report of Scott D. Hampton, CPA of Campos & Stratis, LLC, and identifies the following four problems with the Master's report:

- 1) The Master did not verify the actual units coated.
- 2) The Special Master's report is incorrect because units coated on Mr. Failor's and Mr. Gilmer's schedules do not match.
- 3) The Special Master's report is incomplete because it does not include the tips MegaDyne coated from November 1995 to March 1996.
- 4) The Special Master has not supported his assumption that MegaDyne was paid on purchases rather than coating of tips.

A. The Master did not verify the actual units coated

This statement is simply not true. The Master performed significant procedures to ensure that the Report indicated the total number of units that were actually coated by MegaDyne. The Report does not describe in detail each and every procedure the Master performed. Some of the procedures with respect to determining the total number of units coated were described in the report while others were not. Those indicated in the Report revolve around the specific testing that was completed with respect to validating the schedule of units coated prepared by MegaDyne. To understand the full scope of procedures performed it is necessary to understand the records that were produced by MegaDyne in the production process and how they interact with the product flow. Based on the understanding of these records and the complete scope of procedures performed by the Master, it will become very clear that the Master did indeed verify the actual units coated.

The procedures performed as indicated in the Report include:

"The Special Master verified quantity received to copies of invoices from National Wire noting lot number. The Special Master verified quantity coated by tracing lot number per quantity received to the "Record of Coating Process Conditions" report."

Although there were no exceptions noted in the schedule prepared by MegaDyne (i.e. no missing receipts of invoices and no instance where the amount coated did not agree to coating reports) the Master did make several adjustments to the conclusions reached by MegaDyne on the schedule. In those instances where MegaDyne could not produce evidence to indicate that a raw material purchase was not coated the Master assumed that coating occurred which benefits the plaintiffs. Adjustments were made for several reasons:

- 1) MegaDyne schedule included coating production subsequent to April 20, 1997 when the agreements indicate the contract expired on April 20, 1997.

Therefore all coating production subsequent to April 20, 1997 was not included in the Master's totals.

- 2) The Master made adjustments for immaterial clerical mistakes.
- 3) In cases where the schedule showed items being received with no indication that an item was coated, the master assumed that the lot number was coated in its entirety the following month. This is a benefit to the Plaintiffs.
- 4) There were instances where the MegaDyne schedule indicated lot numbers that were received but not coated. The Master, however, noted instances where these lot numbers were not included in ending inventory (at September 30, 1997) and therefore the assumption was that these units were coated. This is a benefit to the Plaintiffs.

Based on the above adjustments made to the schedule it should be clear that the Master did not take the schedule prepared by MegaDyne at face value. In addition to the procedures described above, perhaps the most conclusive evidence that the Master has verified the total units coated is the agreement between the conclusions reached in MegaDyne's schedule (as adjusted by the Master) and the independent results obtained by the Master in testing the coating of units.

The Master prepared a listing of all purchases (by lot number, date and quantity) based on independent confirmations received from MegaDyne's vendors. The Master then identified which lot numbers were coated based on various supporting documentation, including coating documents supporting documentation attached to payments to Plaintiffs. The Master summarized the information by product number and finally reconciled the amounts to the (adjusted) schedule prepared by MegaDyne. All material product numbers were reconciled to the exact quantity of units purchased.

B. The Special Master's report is incorrect because units coated on Mr. Failor's and Mr. Gilmer's schedules do not match

As the report of Campos & Stratis indicates the units coated on Mr. Failor and Mr. Gilmer do not agree due to the laparoscopic products. The difference between the two plaintiffs relate to the laparoscopic units coated are included under Mr. Gilmer's agreement but not under Mr. Failor's. The report also points out a difference between laparoscopic units coated and purchased in a given month. The report also points out the April 1997 difference of 196,745 units between the two plaintiffs. This difference simply reflects the expiration of Mr. Failor's agreement on April 20, 1997. The table prepared by Campos & Stratis did not take into consideration Mr. Failor's agreement ending on April 20, 1997. Also column D of Table 1 included numbers of laparoscopic purchases. The other columns A, B, and C were coated units. Therefore there is inconsistency in the columns. In an attempt to match coatings against purchases. The coatings for laparoscopic units for the period March 1996 to April 1997 totaled 45,066 units as compared to the Campos & Stratis schedule of 52,113 units of purchases.

Therefore a reconciliation of Campos & Stratis difference is as follows (from March 1, 1996 to April 30, 1997):

Total coatings from 4/21/97-4/30/97	193,345
Laparoscopic coatings from 3/1/96-4/30/97	<u>45,066</u>
Total Table 1 difference	238,411

C. The Special Master's report is incomplete because it does not include the tips MegaDyne coated from November 1995 to March 1996

Upon commencement of the Order of Reference, the parties agreed upon the time period of the Special Master's work would cover the period of March 1, 1996 to March 31, 1999.

D. The Special Master has not supported his assumption that MegaDyne was paid on purchases rather than coating of tips

For the period from March 1996 to December 1996, the actual payments made to the Plaintiffs were not based on actual coatings or actual sales of coated units. Our schedules indicate the actual coatings and actual sales of coated units. The Special Master noted that the amounts attached to the payments made to the Plaintiffs agreed to the number of units purchased in those months. Based on the agreements Mr. Failor was to receive payments based on actual units coated and Mr. Gilmer was to receive payments based on actual units coated. The Master did not make an assumption that the Plaintiffs were paid based on sales, rather an observation.

KENNETH L. FAILOR ; AND PREMIUM PLASTICS, INC.
A CALIFORNIA CORPORATION; HARVEY VAN EPPS
GILMER, JR., PLAINTIFFS

V.

MEGADYNE MEDICAL PRODUCTS, INC. A UTAH
CORPORATION ; F.K.A. AMERICAN MEDICAL
PRODUCTS, INC. DEFENDANT

TABLE 1
RECONCILIATION OF COATED UNITS

COATED UNITS	FAILOR TOTAL COATED UNITS	PPI (GILMER) TOTAL COATED UNITS	DIFFERENCE LAPAROSCOPIC COATED UNITS	DIFFERENCE DUE TO FAILOR AGREEMENT ENDING APRIL 20,1997	TOTAL DIFFERENCES LAPAROSCOPIC AND PERIOD ENDING
PERIOD					
March-96	424,400	427,396	2,996		2,996
April-96	375,200	376,200	1,000		1,000
May-96	406,200	411,200	5,000		5,000
June-96	294,700	296,700	2,000		2,000
July-96	406,200	409,200	3,000		3,000
August-96	348,000	350,000	2,000		2,000
September-96	279,300	280,800	1,500		1,500
October-96	55,420	60,170	4,750		4,750
November-96	179,000	183,000	4,000		4,000
December-96	158,900	161,900	3,000		3,000
January-97	315,600	317,600	2,000		2,000
February-97	481,350	487,350	6,000		6,000
March-97	708,350	712,770	4,420		4,420
4/1/97 TO 4/20/97	314,805	318,205	3,400		3,400
TOTAL MARCH 1,1996 TO APRIL 20,1997	4,747,425	4,792,491	45,066		45,066
			-		-
PERIOD APRIL 21 TO APRIL 30,1997		193,345	-	193,345	193,345
			-		-
TOTAL PPI (GILMER)		4,985,836	45,066	193,345	238,411